163-63

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 230.

CARMI DIBBLE, PLAINTIFF IN ERROR,

vs.

THE BELLINGHAM BAY LAND COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED APRIL 28, 1893.

(15,308.)

held that these Indians having become citizens July 16, 1869, were *not within* the prohibition of Federal law against the making of contracts. That decision being rendered orally has not been printed, so we can only refer to the memory of Judge Foster for our authority. We ask for a reversal of the judgment.

BEN T. DUVAL,
Attorney for Plaintiff in Error.

H. C. MECHEM,
Counsel.

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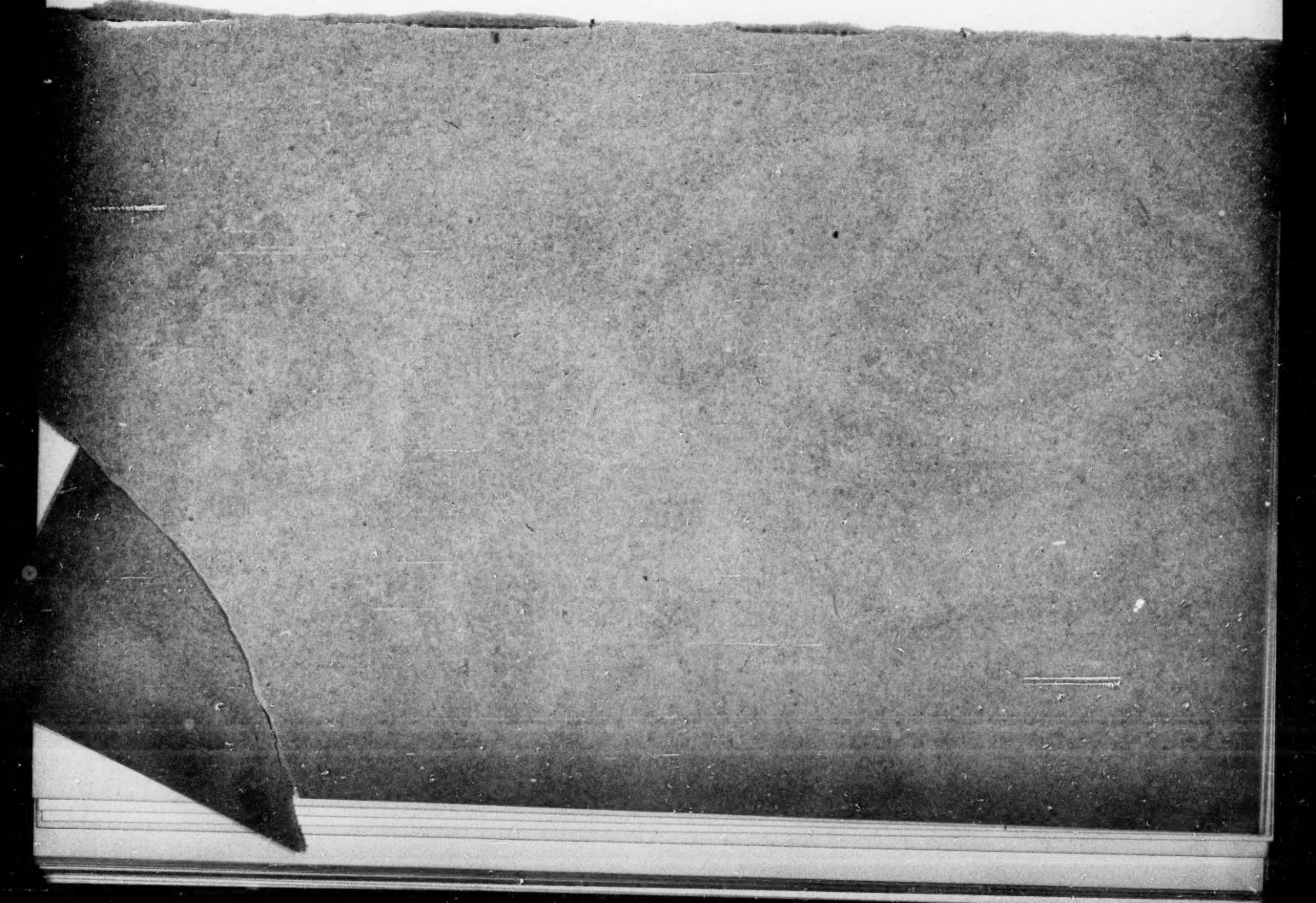

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1 In the Superior Court of Whatcom County, State of Washington.

BELLINGHAM BAY LAND CO., Plaintiff,
vs.
CARMI DIBBLE, Defendant. } # 801.

2 P. M.

Mr. THOMPSON: It is admitted that the plaintiff, The Bellingham Bay Land Co., is a private corporation, duly organized and existing under the laws of the State of Washington, having its principle office if Fairhaven, Whatcom county, State of Washington, and under and by virtue of its charter have full powers to sell real estate and perform all such business as may appertain thereto.

It is agreed and stipulated on behalf of the plaintiff in the case that Betsy Jones, who is conceded to be the common source of title between plaintiff and defendant, died during the month of December, 1868. We are not certain of the date on either side, but will name this as the date. It is a fact, she is dead.

We concede that Thomas Jones, who was the husband of Betsy Jones and who was owner of one-half of this donation claim,
2 is also dead and was dead at the time of the commencement of this suit.

The plaintiff is entitled to a decree in accordance with the prayer of the complaint in so far as that portion of the Jones claim is concerned which was donated to Thomas Jones and is the west half of the donation claim of Thomas Jones and Betsy Jones, his wife.

It is stipulated and agreed between the plaintiff and defendant that the plaintiff may have a decree in accordance with the prayer of the complaint, quieting its title to the west half of the donation claim of Thomas Jones and Betsy Jones, his wife, that being the half of the claim that was donated to Thomas Jones, the defendant having filed a disclaimer as to the ownership of any title or interest in the said west half of the donation claim.

Mr. LEAMING: Before any evidence is offered on the part of the plaintiff in the case we desire to enter upon record the following objections:

We object to the introduction of any testimony for the purpose of proving that a power of attorney from Betsy to Thomas Jones was ever executed, or the existence of any such instrument, for the following reasons:

First. That no lawful power of attorney from wife to husband could exist prior to the year 1881, and the existence of the same is therefore irrelevant and immaterial, especially prior to the year 1869.

3 Second. Because plaintiff and its grantors, by reason of the long delay in recording or establishing the existence of any such power of attorney, if any ever existed, cannot lawfully or

equitably at this time claim a right to establish the same, and especially as against the defendant Dibble.

Third. Because the contents of a written instrument cannot be proven by parol testimony after the lapse of as many years as have transpired since the existence of the alleged power of attorney in this case and the death of all parties in interest.

We also desire to object to the introduction of any testimony for the purpose of proving adverse possession of the premises in question for the following four reasons:

1st. Because the same is incompetent, immaterial, and irrelevant under the issues of the case as framed.

2nd. Because title by adverse possession can in no case stand as foundation for a suit to quiet or remove a cloud from such title.

3rd. Because the lands in controversy are of such a character that title by adverse possession cannot be acquired thereto.

4th. Because adverse possession can in no case be pleaded except as a defense.

These objections we desire to introduce at this time, preliminary to the offering of any proofs on the part of the plaintiff, in order that their force may be preserved to us as against the proofs to be offered as a ground of the relief asked in the complaint.

The COURT: I will overrule objections as made and give
4 exceptions.

Mr. THOMPSON: I will offer first a certified transcript of the patent of the United States to Thomas Jones and wife, marked Plaintiff's Exhibit "A," and hand to counsel for examination.

Mr. BLACK: We have no objections.

Filed as Exhibit "A."

Mr. THOMPSON: I next offer in evidence a certified transcript of the deed of Thomas Jones and wife to Edward Eldridge, which deed was executed by Thomas Jones and Betsy Jones, by her attorney-in-fact, Thomas Jones, accompanied by the offer to prove the power under which Thomas Jones was acting.

(Marked Plaintiff's Exhibit "B.")

Mr. LEAMING: We desire to object to the introduction of this deed in evidence for the following reasons:

1st. That the deed on its face is insufficient to operate as a conveyance of land.

2nd. Because no lawful power of attorney could exist from the wife to husband at the date of the execution, or the alleged execution, of the deed now offered.

3rd. Because at the date of the alleged execution of the deed offered no married woman could execute any instrument for the conveyance of land or interest therein without the acknowledgement of her act being had before an authorized officer, made separate and apart from her husband, under a private examination, a certificate of which was required by law to be made a part of the instrument.

5 4th. Because the plaintiff and its grantors *have*, by reason of long delay in recording or establishing the existence of any certain power of attorney as is claimed to exist in this case,

cannot lawfully or equitable, at this time, claim right to establish the same, especially as against the defendant Dibble.

5th. Because the contents of a certain written instrument cannot be proven by parol testimony after the lapse of as many years as have transpired since the execution of the alleged power of attorney in this case and since the death of all parties to the transaction.

And also upon the further grounds that it is incompetent, irrelevant, and immaterial under the issues in the case as framed, especially in view of the admissions already made to the effect that the west half is not in controversey in this case, and that the east half was conveyed by donation certificate of the United States to Betsy Jones, and both are now deceased.

I will add another objection, namely, that the deed on its face does not purport to be or to have been acknowledged by Betsy Jones.

COURT: Upon all of the objections that will be made during the progress of the trial the court will not pass upon them as made at the time, but will when final decision is made in the case, and will allow the respective parties all exceptions that are taken.

Plaintiff filed Exhibit "B."

6 Mr. LEAMING: We desire to add to the objection already made another, which may not be fully covered and is designed to be, and that is that the deed is incompetent, irrelevant, and immaterial under the issues, unless preceeded by proofs of the existence and proper execution of a power of attorney, duly and properly executed by Betsy Jones to Thomas Jones, for the purpose of authorizing conveyance of land now in question.

Mr. THOMPSON: I offered it accompanied with the declaration that I would follow it with proofs of the power of attorney. I offer in evidence also the deed of Edward Eldridge and wife to Erastus Bartlett.

(Marked Plaintiff's Exhibit "C.")

Mr. LEAMING: The offer of this deed is, of course, only competent and only relevant upon the first determining that the deed offered as preceeding exhibit is admissable in evidence and sufficient to pass title. We therefore object to the introduction of this deed, in that it — incompetent, irrelevant, and immaterial, until the title is determined to have passed under the preceeding proofs necessary, but we are willing at this time, for the convenience of the counsel and court, to waive any objections to the order of proofs, reserving only the objection that may exist to their competency, relevancy, or sufficiency to establish the matters urged, and reserving at all times the objections that any proofs of the existence or contents of a power of attorney in controversy are irrelevant and incompetent *inder* the issues.

Objections overruled, with understanding they will follow with proof of power of attorney. Exception allowed.

COURT: If I allow these exhibits to remain in testimony, exceptions will be allowed to all objections made.

7 Mr. LEAMING: The objection to this deed, therefore, with that understanding, will be almost identical, and perhaps it

is not worth while to repeat all the objections made to the preceeding deed, and I will simply here be understood to have repeated the objections made to the former offer of Exhibit "B."

Mr. THOMPSON: I now offer deed of Edward Eldridge and Theresa Eldridge to Erastus Bartlett, covering a portion of the same property.

(Marked Plaintiff's Exhibit "D.")

Mr. LEAMING: To that offer the same objections were made as were made to Exhibit "C," which objections, of course, were made with the understanding that they would cover all objections to Exhibit "B."

Mr. BLACK: And the still further objection that that instrument does not purport to be acknowledged in accordance with law, in that the certificate does not certify that the examining officer was personally acquainted with the person purporting to have executed the deed.

Objection overruled and exception allowed.

Mr. THOMPSON: I will offer now a certified transcript of deed executed by Erastus Bartlett to Edward Eldridge, covering portion of the property in controversy.

(Marked Plaintiff's Ex. "E.")

Mr. LEAMING: To the offer of Exhibit "E" defendant interposes the same objections that were made to Exhibits "B" and "C" and "D," including the last objection to Exhibit "D," namely, that the acknowledging officer does not certify that he was personally
8 acquainted with the party that appeared before him to make an acknowledgement of the instrument.

Objection overruled and exception allowed.

Mr. THOMPSON: I now offer in evidence the deed of Erastus Bartlett and wife to Hugh Eldridge, which deed purports to cover one square acre of the ground.

(Marked Plaintiff's Ex. "F.")

Mr. LEAMING: The defendant interposes to Ex. "F" same objections that have been urged to the same preceeding Exhibits "B," "C," "D," and "E," including the objection made specifically to Exhibits "D" and "E" in relation to defective acknowledgement. With the court's permission, then, I will at this time interpose an additional objection to Ex. "F," on the grounds that by the matters contained in the Ex. "F" it appears that the grantor, Erastus Bartlett, was married prior to the execution of the deed and his wife is not joined in the deed.

Objection overruled. Exception allowed.

Mr. THOMPSON: I offer now power of attorney from Erastus Bartlett to Edward Eldridge.

(Marked Plaintiff's Ex. "G.")

Mr. LEAMING: We have no objections to the power of attorney other than the objections that are covered by the specific objections made to Ex. "B" and "C."

Mr. THOMPSON: We offer the power of attorney from Theresa Eldridge to Edward Eldridge, dated 9th day of February, 1889.

(Marked Plaintiff's Ex. "H.")

Mr. LEAMING: I would like the records to show that all papers offered by plaintiff in this case are certified copies of the records
9 of the county, under the seal of county auditor. We object to the power of attorney marked Ex. "H" for the same reasons specifically stated to the objections to the Ex. "B," "C," "D," and "E," including the objection that the acknowledging officer does not certify that he personally knew the parties before him, and the additional objection that the power of attorney does not describe the land in controversy in this case in such a manner as to identify the land in controversy as the land designed to be included in the power of attorney.

COURT: How about that description?

Mr. BLACK: The language used is "Deed, Jones donation claim."

Mr. THOMPSON: I offer deed in evidence now executed by Edward Eldridge and Theresa Eldridge, by Edward Eldridge, attorney-in-fact, and Erastus Bartlett, by Edward Eldridge, attorney-in-fact, to the York syndicate, naming the persons constituting the York syndicate. This deed is only offered to show that descriptions are correct. That covers land which is disclaimed in the complaint.

(Marked Plaintiff's Ex. "I.")

Mr. LEAMING: I will interpose objection to that deed for the reasons specifically stated as to Ex. "B," "C," and "D," and for the additional specific reason that the answer admits that the tract of land described in the deed now offered is exempt from the Jones donation claim and forms no part of the present controversy, and the deed is therefore irrelevant and immaterial for any purpose. We also include objection for insufficient acknowledgement.

Objection overruled. Exception allowed.

COURT: I will let it go in with the same understanding that these previous exhibits are offered.

10 Mr. THOMPSON: I now offer a deed made by Hugh Eldridge and Erastus Bartlett to Edward Eldridge, tracing the title to that one square acre, which I introduced a while ago.

(Marked Ex. "J.")

Mr. LEAMING: To Ex. "J" defendant makes the same objection as enumerated to Ex. "I."

Objection overruled and exception allowed.

Mr. THOMPSON: If the court please, I offer in evidence a plat of what is designated as a map of the Eldridge-Bartlett addition to the town of Sehome, in Whatcom county, together with certificates and dedications made to same.

(Marked Plaintiff's Ex. "K.")

Mr. LEAMING: We object to Ex. "K," the plat offered, on the ground that it is incompetent, irrelvant, and immaterial under the issues, in that it covers no portion of the land in controversy in this case and can have no relation to the matters in controversy, and on the additional grounds that are stated specifically as to "B," "C," and "D;" and, further, that the certified copy of the plat is not admissable in evidence as proof of the matters therein contained.

Mr. BLACK: And, further, for the reason that it on its face purports to be executed by Erastus Bartlett and Theresa Eldridge, by

Edward Eldridge, their attorney-in-fact, where*in* there has been no introduction *by* any authority by either of the parties named to Edward Eldridge to make such a dedication.

Mr. THOMPSON: The purpose of the introduction of this
11 plat is to show the exercise of acts of ownership and control over this property and the allegations of the complaint that we have been in possession of the property, and, whether it is a formal map or not, it passes as one of the steps in exercising jurisdiction and control over this property. We will agree that this plat is on the west half and no part of it on the east half.

Mr. THOMPSON: I now offer the power of attorney which was executed by Theresa Eldridge to Edward Eldridge, dated on the 2nd day of April, 1889, which is more *apprehansive* in its terms and broader than the other that was already introduced.

(Marked Plaintiff's Ex. "L.")

Objection overruled. Exception allowed.

Mr. LEAMING: We desire to object to the offer for the reasons specifically named as to Exhibits "B," "C," and "D," and the additional objection that the power is void for indefiniteness and uncertainty of description, and, further, that there is no certificate of acknowledging officer that he was acquainted with the party who executed the deed.

Objection overruled. Exception allowed.

Mr. THOMPSON: I will next offer in evidence the deed of Erastus Bartlett, Edward Eldridge, and Theresa Eldridge, by her attorney-in-fact, to the Bellingham Bay Land Company, bearing date of the 16th day of May, 1890, including a very large amount of property, and, amongst other property, this property in controversy.

(Marked Plaintiff's Exhibit "M.")

Mr. LEAMING: Defendant objects to this deed upon the
12 grounds stated heretofore specifically in relation to Exhibits "B," "C," and "D," and for the further objection that the same is not acknowledged, in that the officer purporting to acknowledge the same has not affixed a seal thereto.

Mr. THOMPSON: I am sure that is a mistake in copying this, and I will have this corrected; I know well it is right.

Objection overruled. Exception allowed.

Mrs. HARRIET PETERSON, the witness, being produced, sworn, and examined, testified as follows:

Examined by Mr. THOMPSON:

Q. What is your given name?
A. Harriet.
Q. How long have you lived here on Bellingham bay?
A. I believe it is about thirty or thirty-two years.
Q. Did you know Thomas Jones during his lifetime?
A. Yes, sir; I knew him.
Q. How long did you know him?

A. I cannot exactly say; a good bit. He boarded with me a good while.

Q. Did you know Betsy Jones, his wife?

A. I diden't know her very well. I was not a great deal acquainted with her.

Q. How long, about, did you know her?

A. I can't say; I knew her a great deal ever since, but she was away in the country.

13 Q. Did you buy some property from Thomas Jones?

Mr. LEAMING: We object to the testimony as to whether or not she has at any time purchased property from Thomas Jones, on the ground that it is immaterial, incompetent, and irrelevant and in no degree tends to establish any of the issues in the case.

COURT: I will permit her to answer the question and give you an exception.

A. Yes, sir.

Q. At the time you were purchasing that property and getting your deed did you have any talk with Thomas Jones?

Mr. LEAMING: We make objection to the answer of the witness to this question for the reason that it is entirely irrelevant and immaterial under the issues in this case whether the witness has had conversation at any time with Thomas Jones on any subject, and is therefore wholly inadmissable as proof of any fact within the scope of the issues.

COURT: I will reserve my ruling on that question and will let her answer at this time yes or no.

Q. Did you have any conversation with Thomas Jones at the time you were purchasing the property and when you got the deed?

Mr. LEAMING: We desire the same objection to this question as to preceeding one, and the additional objection that it is indefinite as to time of the alleged conversation.

COURT: I will permit her to answer yes or no.

Q. What is your answer—did you talk with Mr. Jones?

A. No more than I would talk to any one else a stranger.

Q. When was it that you bought the house and lot?

14 A. 22 years ago, I think; I am not sure. Mr. Barkhouser, he was the one who bought it for me. I paid the money. I think he is a witness.

Mr. LEAMING: We object to the question just asked, which, by permission of the court, is allowed to stand as preceeding the answer, and that the question and any answer that the question anticipates is incompetent, irrelevant, and immaterial under the issues in this case, in that it in no way tends to prove or establish the same; and, further, that the fact or circumstances as to whether this witness at any time purchased of Thomas Jones any lots or had any conversation with Thomas Jones with reference to any lots is en-

tirely beyond the scope of any matter in controversy in this suit and in no way in support of any of the issues.

COURT: I will permit her to answer the question with the understanding that counsel will show its relevancy, competency, and materiality.

Mr. LEAMING: Subject to the reservation of the court, we desire to strike all of that part of the answer which includes statement that she had received a deed from Thomas Jones for some land or other, because it is secondary evidence.

COURT: I will let the answer stand to the question, if she bought this land, and will give exception. I will let it all stand, if it is but a preliminary question.

Q. State whether at the time you were making purchase of the house and lot from Thomas Jones you saw any paper that was or purported to be a power of attorney from Mrs. Jones to her husband.

15 Mr. LEAMING: The objections to this question on behalf of defendant are the first three objections that were announced at the beginning of the trial, and to any testimony of this class, which I will not here repeat for sake of brevity, but refer to as simply stated at commencement of trial; and the fourth objection, that the question in the form that it is asked *in* objectionable, in that it directs the witness' attention too closely to the matter sought to be elic-ted by the question and the answer invited. Next, and fifth objection, that it is perfectly manifest by the condition and age and conduct of the witness upon the stand that she is an incompetent person to at this time identify or describe any piece of paper she may have seen at so distant a period, to entitle the matters to stand, in a case of this magnitude, as recorded evidence. We object further on the ground that it assumes that the witness has at some time received a deed from Thomas Jones for some property or other, which assumption is unwarranted by proofs as they stand at this time.

Mr. BLACK: And, further, for the reason that it calls for an answer that is a legal conclusion and not a fact. Further, in that a power of attorney could not be proven until after the execution thereof had been fully established.

Mr. LEAMING: And the further objection that an uneducated witness, such as the one now upon the stand, so manifestly unacquainted with the legal requirements of the matters necessary to constitute a valid power of attorney or to determine the validity of the execution of any such instrument is incapable of testifying to the matters that the question assumes to elicit, and cannot stand as proof *to* the existence of any such document.

16

A. I saw one in Mr. Barkhouser's hands.

Mr. LEAMING: I desire to enter upon the record at this time a motion to strike for the same reasons that were urged in the objections.

COURT: I will reserve my ruling on that question at this time.

Q. What was that paper that you saw Mr. Barkhouser have?

Mr. LEAMING: At this time we renew the objection to the question, upon the grounds specifically stated in the objection to the preceeding question.

A. I believe it was a power of atterney. He said it was. He got it. He sent one first, and sent again, as the first did not suit. Before I paid the money. He said it was not good, but the next one was.

Mr. LEAMING: We interpose at this time a motion to strike for the same reasons that were urged against the question. We desire also, as another ground for a motion to strike, to urge what I did not urge before, that the witness, from her testimony as I understand it, stated that her knowledge was from what Mr. Barkhouser told her, and for that reason the evidence is secondary in its character.

Q. Whose power of attorney was it?

Mr. LEAMING: We renew the objections to that question that have been specifically made to the two or three preceeding ques-
17 tions, and that was that it is entirely incompetent, especially in that there could be any power of attorney proven in any manner, excepting by the proof of a due, appropriate, and proper execution of such an instrument, and that such proofs must precede the proofs of the contents of that instrument in all cases. At this time we renew the several objections made and stated to the preceeding question.

A. It was mine, I believe.

Q. Who signed that power of attorney?

Mr. LEAMING: To this question we interpose the same objections that have been fully stated to the preceeding questions.

Question withdrawn.

Q. State whether or not that was a power of attorney which Betsy Jones gave to her husband?

A. Yes, it was.

Mr. LEAMING: At this time we renew the objections made to the several preceeding questions, and desire to add the additional objection that the question is objectionable, in that it is leading.

Before cross-examination we desire to interpose a general motion to strike the testimony of this witness, upon the ground that we have urged against its admissability, and, further, upon the specific ground that it in no way tends to establish the issues made in this case.

COURT: I will pass upon this motion same as the other cases I spoke of. I will strike it out if I sustain the motion, and if not, I will give exception.

Each objection made to this witness's testimony overruled.

Exception allowed.

18 Cross-examination.

By Mr. BLACK:

Q. Mrs. Peterson, Mr. Barkhouser told you about having this paper, did he?
A. Yes, he sent for two, and the first was not good.
Q. He told you all that?
A. Yes, he told me that.
Q. It was a written power of attorney that he had from Betsy?
A. It was in a square envelope and I believed it was the power of attorney and I believe it yet. He said he had it, and I did not doubt it.
Q. That was a letter he had from Betsy Jones?
A. It was the power of attorney; it was a square envelope.
Q. It looked like a letter, didn't it?
A. A business kind of a letter.
Q. Do you know where it came from?
A. British Columbia.
Q. That is what he told you?
A. Yes, I seen it in his hand.
Q. He told you that, did he?
A. Yes, I seen it.
Q. The deed was witnessed, was it? It had witnesses to it?
A. I don't know; I don't know whether he was one or not.
Q. Do you know where Betsy Jones was then?
A. In the country.
Q. In British Columbia?
A. On the road.
19 Q. Living with some other man?
A. Yes.
Q. Had she left Thomas Jones?
A. They seemed to be friendly when they sold the house.
Q. She was with some other man?
A. Yes; with some other man.
Q. Where was that—at 145-mile Post house?
A. Yes; that is the place.
Q. In British Columbia?
A. Yes; up in the country; living on the road.
Q. You did not examine this letter that he, Mr. Barkhouser, had?
A. No; I did not.
Q. All you know about — was by what he told you?
A. He told me and I put my trust in him, because they said he was a very nice man.
Q. He was a nice man, wasn't he?
A. Yes; he was.
Q. And all you know was what he told you?
A. I know, as far as that is concerned, he offered to sell it to me.
Q. Who did?
A. Thomas Jones did. I bought other things from him.
Q. You saw this letter, did you not?
A. Yes.

Q. Did you read it?
A. No; I did not read it.
Q. You only know what he told you?
20 A. Yes; only what he told me. He had power of attorney, and it was all right.
Q. You only know what he told you?
A. Only that what he told me. I believed him.
Q. Do you know when Betsy Jones went up to the country—to British Columbia?
A. She went a good while before him. She sold out to me before she went up there.
Q. She was living with some man, you say?
A. She was living with some other man.
Q. Do you know how long it was before he sent up for this letter before it cam- back?
A. It was not long.
Q. You think that she sent it back as soon as she got his letter, do you?
A. Yes, sir.
Q. How much was that land worth?
A. I paid him two hundred dollars for this land, fifty or sixty feet back. That is all.
Q. Do you know where the Jones claim was?
A. Yes; I know.
Q. What was it worth?
A. He offered to sell it to me for one hundred dollars. I wish I had bought it now.
Q. You own the same lot now, do you?
A. The company does.
Q. The company does?
A. Yes, sir.
21 Q. Do you know what that power of attorney was for?
A. Yes; Mr. Barkhouser said it was all right.
Q. To sell any more land than that you bought?
A. I could not swear to that.
Q. Did Mr. Barkhouser tell you it was only for your lot?
A. No; he did not tell me.
Q. When you was trying to buy this lot did you go to him and have him get the power of attorney?
A. Mr. Jones and Mr. Barkhouser together; then Mr. Barkhouser ordered it and I paid him what he charged.
Q. What time of year was that?
A. I don't know.
Q. Do you think it was towards spring?
A. Yes; I think it was.
Q. You don't know what year?
A. No; I don't remember; it was so long since.
Q. Do you know who was foreman at the coal mine?
A. Mm. Moody.
Q. How long had he been there?

A. A long time. It was a long time before he went away, before Mr. Myers came.
Q. How long before Mr. Myers came, do you remember?
A. A good bit before he came.
Q. Did you tell how old you were?
A. 68 years.
Q. 68 years?
A. Yes, sir.

Q. What kind of health have you, Mrs. Peterson?
22 A. Very good until I got this stroke. I have been sick two or three weeks.
Q. Did you have a stroke of paralysis?
A. Yes, sir.
Q. When?
A. A year ago this month.
Q. You don't feel very good?
A. No, sir; I can't stand it here long; I will soon have to go.
Q. You can read, can you, Mrs. Peterson?
A. Not very good.
Q. Can you read writing?
A. No, sir; not very good; never could.
Q. You never could, you say?
A. Never could be very good at it.

Mr. LEAMING: At the conclusion of the cross-examination we desire to renew our motion to strike, on the additional ground that she stated that she only knew what Mr. Barkhouser told her about this transaction. The most that she saw, by her testimony, was an envelope. Her knowledge, therefore, is limited wholly to what she has been informed by others, and is certainly incompetent to stand any proof. The condition of the witness' health and attainments are such as shown are proofs, as well as her appearance, that her testimony should not be allowed to stand as evidence proving or tending to prove matters that it is intended to substantiate.

Motion denied. Exception allowed.

Witness excused.

23 Mr. BARKHOUSER, the witness, being produced, sworn, and examined, testified as follows:

Mr. LEAMING: We desire to ask him to state what he desires to prove by this witness.
Mr. THOMPSON: I decline to state; so counsel can get an exception.
Mr. Black asks for ruling. The court denies motion and gives exception.

Examined by Mr. THOMPSON:

Q. State your name, please.
A. H. C. Barkhouser.

Q. Where do you reside?
A. Fidalgo, Skagit county, this State.
Q. Where did you reside during the year 1862?
A. Down in Whatcom county.
Q. At what place down in Whatcom county?
A. The town Whatcom.
Q. How long did you reside here prior to 1862?
A. Came to the town in 1859.
Q. How long did you continue to reside there?
A. In the town and in the vicinity, until 1865.
Q. What was your business, and what official position, if any, did you hold in Whatcom county during the year 1862?

Mr. LEAMING: We object to this question on the ground that to that part of the question relating to the official position as
24 not the best proof of such official position, especially if the question was designed to prove that he was a notarial officer, as the regular and proper records will show such appointments, and that the evidence of this witness will be secondary in its character and inadmissable.

Objection overruled. Exception allowed.

A. Auditor and recorder.
Q. Were you acquianted at that time with Thomas Jones?
A. Yes, sir.
Q. How long did you know him?
A. I knew him from the time I lived in town until he died.
Q. About when did he die?
A. I could not tell you.
Q. Were you acquainted with his wife, Betsy Jones?
A. Yes, sir.
Q. How long did you know her?
A. I knew her from 1858 until she left the town. I could not tell when that was.
Q. Were you acquainted with Mrs. Peterson, the old lady who just left the witness stand?
A. I know the lady that was here.
Q. Was she living here in Whatcom at that time, 1863 and 1864?
A. At that times; yes, sir.
Q. State whether or not you have any recollections of the circumstances of her purchasing the piece of property from Thomas Jones.

Mr. LEAMING: We interpose the objection that it is incompetent and irrelevant under the issues, in that it in no way tends to
25 support any of the matters in controversy, and that the fact that Mrs. Peterson purchased or did not purchase lands of Thomas Jones at that time has no connection whatever with the issues of this case.

COURT: I will permit the question and give exception.

A. I remember something about the purchase, but the particulars I could not tell you.

Q. State whether or not you have any recollection of the circumstances of the execution of the deed by Thomas Jones to Edward Eldridge, which deed is now handed to you and marked Exhibit "B" in this case.

A. I have no other recollection of the matter than what I see on the document.

Q. On the acknowledgement?

A. On the document or, I will state, acknowledgement.

Q. I will ask you to state whether or not that acknowledgement was made at the time of the transaction.

A. To the best of my knowledge.

Mr. LEAMING: We at this time interpose the objection to any testimony of this witness as to that transaction or any part of this transaction in that, in addition to the objection already urged, it now appears that the witness has no recollection of any character of his own concerning the transaction. All that he knows is derived from the face of the papers before him, and of these matters the papers are the only and sole and best proofs, and if the witness has no memory of the transaction or circumstances connected
26 with them excepting from what he sees from the papers, his testimony is, of course, incompetent to prove any matters relating to it.

Objection overruled. Exception allowed.

Q. Are you the same H. C. Barkhouser whose name is on the certificate of acknowledgement of that date?

A. If that is a true certificate, I am.

Q. Are you the same person?

A. I am.

Q. What, if any, recollection do you have concerning the power of attorney from Betsy Jones to her husband, Thomas Jones?

Mr. LEAMING: To that question we desire to interpose all of the objections heretofore made, which, perhaps for the sake of brevity, can be shortened by reference to the original objections first, second, and third above named to any testimony tending to prove the existence at any time of the power of attorney from Betsy Jones to Thomas Jones, and these three objections, I believe, cover the entire ground of all objections to this testimony. I would like to specify in detail an additional objection that might be covered generally by those named, namely, that a power of attorney cannot be proven excepting by the production of the original instrument, or, in the absence of the original instrument, by proof of its loss, and then proof of its contents. The proof of its contents, however, must in any case be preceeded by proofs of its execution, and of its execution in such a manner as the statute provides that such instruments must be executed before they can be valid and binding. The execution having been established by sufficient proofs, then and
27 only then would the next step be open to inquiry, namely, the contents of that instrument; which contents would have to be in any event, even though so much time had not elapsed,

proven by clear and explicit testimony of its contents, and even that cannot be done except in the most extreme cases, and must be received with the most extreme caution and care. This exception I desire to note. We therefore note to this objection on the ground that it is simply asking of this witness if he has any recollection of the power of attorney without first having established by proof the execution of such power of attorney or establishing by the witness the fact that he has a knowledge of the contents or execution of such a power of attorney.

Objection overruled. Exception allowed.

A. I have no distinct recollection in regard to it.

Q. If your recollection is not distinct in regard to it, state whether or not you have any recollection on the subject.

Mr. LEAMING: We renew the same objections as last enumerated.

Objection overruled. Exception allowed.

A. If you will allow me to tell you about it. In regard to this transaction and the Smith——

Q. Answer the question in your own language.

Mr. BLACK: We insist that witness be instructed to state facts and not what he believes or what he thinks.

COURT: I will permit him to answer.

Mr. LEAMING: Give us exception on motion to instruct witness that he will only be allowed to testify on matters of which he knows.

28 COURT: I will permit the witness to answer, and give exception.

A. I feel almost pos-tive in regard to the Smith affair, and the other I have an indistinct recollection of the power of attorney, and one thing that makes me certain is this acknowledgement in this instrument. I say pos-tively I never made that certificate unless I seen it.

Mr. LEAMING: We desire to interpose motion to strike testimony as to what witness' impressions are, and especially a motion to strike that part of the testimony that is to effect that he would never have signed such a certificate unless he saw the power of attorney.

COURT: Latter part is stricken, but other overruled and exception allowed.

Q. You said in your answer that you were almost pos-tive as to the Smith affair. Explain fully what it is you feel positive about.

Mr. LEAMING: Your honour will, of course, give benefit to the same objections as to relevancy of his testimony as made in first instance?

—: Yes; and allow exception.

A. In regard to the Smith affair?

Q. Yes.

A. Well, I don't know as there is anything I can say pos-tive about. My impression was that I was present during the transaction, and I also have the impression that there was a power of attorney. I could almost feel positive of it, but I could not swear pos-tive.

29 Q. Mr. Barkhouser, when you refer to the Smith affair you mean, do you not, the matter about what Mrs. Peterson testified?

A. Yes, sir; I only know her as Mrs. Smith. She was Mrs. Smith at that time.

Q. That is the same lady that was on the stand?

A. Yes, sir.

Q. State whether or not you can tell me, from an examination of the certificate of acknowledgement of the deed of Thomas Jones and wife to Edward Eldridge, whether a power of attorney was produced to you at that time from Betsy Jones to Thomas Jones.

Mr. LEAMING: We desire to interpose to this question the same objections enumerated to this general class of testimony and the additional specific objection that the witness has already testified that he cannot remember the transaction, and all he knows about it is what he sees upon the deed, his certificate of acknowledgement; and, further, that the question, as framed, calls for a legal conclusion on the part of the witness in his testimony.

Objection overruled. Exception allowed.

A. I feel pos-tive there was a power of attorney produced at that time.

Cross-examination.

By Mr. BLACK:

Q. You — a lawyer, Mr. Barkhouser?

A. No, sir.

30 Q. I understood you to say that the only recollection you have of the transaction relating to this deed, Plaintiff's Ex. "B," from Jones to Eldridge, is that recollection which you acquire by examining the deed.

A. Yes; the only recollectian I can get, about.

Q. You have a recollection in the Smith affair?

A. Not a pos-tive one.

Q. You have absolutely no recollection relative to the transaction in this Eldridge matter?

A. I feel pos-tive, in accordance with that certificate.

Q. That is all?

A. Yes, sir.

Q. You would not remember, then, of acknowledging that deed if not for this certificate?

A. No, sir.

Q. The only recollection you have is in that certificate. You would not put down something that was not true?

A. No, sir.

Q. That is the only recollection or knowledge you have?
A. Yes, sir.
Q. You remember writing to Betsy Jones for the certificate?
A. No, sir.
Q. You don't remember them coming back to you?
A. No, sir; it seems to me that the first power of attorney that came was deficient in some way—that is my impression—and the power of attorney was sent back and returned.
Q. That is in the Smith matter?
A. Yes, sir.
Q. You don't know who acknowledged it?
31 A. No, sir.
Q. Don't know whether it was acknowledged or not?
A. No, sir.
Q. You don't remember much about the Smith matter?
A. Nothing much.
Q. You don't remember anything at all about the other matter, excepting what you see by this paper?
A. No, sir.
Q. Where was Betsy Jones at this time?
A. In British Columbia some place.
Q. Do you remember whether the power of attorney was in the shape of a letter in the Smith matter?
A. I don't understand.
Q. Was it in the shape of a letter?
A. Do you mean folded in the shape of a letter?
A. No, sir; written like a letter.
A. Do you mean was it drawn in legal form? Whether it was a power of attorney in shape of a letter? I could not answer that question.
Q. You say you are not a lawyer?
A. No, sir.
Q. You may state whether that is a good acknowledgement, in your opinion, on that deed.
A. Yes; my opinion is that it is.
Q. That it is a good acknowledgement?
A. Yes, sir.

Witness, being handed Plaintiff's Ex. "F," is asked whether, in his opinion, the acknowledgement to that deed is a good and
32 sufficient one.

Mr. KERR: We object to that as incompetent and immaterial.

COURT: I will let him answer the question.

A. I could not tell whether it is or not. I could not tell whether it is legal.
Q. Do you know whether or not, in 1862, Betsy Jones could have given a legal power of attorney to her husband?

Mr. THOMPSON: We object as incompetent.

COURT: I will sustain the objection and give an exception.

Witness excused.

EDWARD ELDRIDGE, the witness, being produced, sworn, and examined, testified as follows:

By Mr. THOMPSON:

Q. Are you the same Edward Eldridge whose name has been mentioned in the pleadings in this case and various papers which have been introduced in evidence here?

A. I am.

Q. How long have you been a resident of Whatcom county?

A. Since May, 1853.

Q. Were you acquainted with Thomas Jones during his lifetime?

A. Yes, sir.

Q. When did you first become acquainted with him, and how long did you continue to know him?

A. I became —, to the best of my knowledge and recollection, — the years 1854 or 1855—somewhere in there; it may have been 1856, but I think it was 1855, and knew him from that time until he died.

33 Q. When and where did he die?

A. He died in Bellingham Bay, in the year 1869, I think.

Q. Were you acquainted with Betsy Jones, his wife?

A. I was.

Q. When did you become acquainted with her? How long did you continue to know her?

A. I became acquainted with her about the same time I did with her husband and knew her until she left the Bay, which, I think, was in '59 or '60.

Q. Do you know where she went when she left this Bay?

A. My impression is that she went to Port Townsend from Bellingham Bay, and from there to British Columbia.

Q. Do you recollect Thomas Jones and his wife settling on what is known as the Jones donation claim?

A. I do.

Q. Did you know them during the time they continued to reside upon this land?

A. Yes, sir.

Q. State whether you have any recollection of the circumstances of the purchase of that land from Thomas Jones by yourself.

Mr. LEAMING: To that question, your honor, we desire to object on the grounds that it is incompetent, in that it is irrelevant and immaterial. The circumstances attendant upon the purchase of the land are not elements of proofs under the issues, and the question also assumes as a basis the alleged purchase as a fact.

COURT: Objection overruled. Exception allowed.

34 A. Mr. Jones came to me in 1862, the spring of 1862—I forget the exact date—and wished to know if I would purchase his land.

Mr. LEAMING: We desire to interpose in this connection an objection that this testimony is incompetent in the manner it is given,

in that it is stated that Mr. Jones came to him and desired him to make a purchase. Such testimony cannot be received under any rule of evidence—admitted. We move to strike so much of testimony as witness has given in response to this question.

COURT: I will permit the motion to strike — stand, and I will also let the answer of the witness stand. Exception allowed.

Q. Do you recollect the circumstances?

A. I recollect most of them. That is thirty years ago, and transactions of that sort are not as fresh in a person's mind as they were thirty years ago.

Q. Who drew the deed for you at that time?

A. To the best of my recollection, it was Mr. Barkhouser.

Q. What position was Mr. Barkhouser filling?

A. County auditor.

Q. Who was present, if you know, when that deed was drawn?

MR. LEAMING: We desire to have it understood that this is still taken subject to our objection that it is incompetent under the issues, and the additional and specific objection that the party present at the drawing of the deed, as well as the person who drew the deed, is irrelevant matter and inadmissable in testimony.

Objection overruled. Exception allowed.

35 A. To the best of my recollection, Mr. Smith, Mr. Barkhouser, Thomas Jones, and myself were the only ones present.

Q. Who was Mr. Smith?

A. He was the husband of the lady who gave her testimony here a short time ago, at that time.

Q. Do you refer to Mrs. Peterson?

A. Yes, sir.

Q. Who took the acknowledgement of the deed?

MR. LEAMING: We object to that as not the best proof.

Objection overruled. Exception allowed.

A. Mr. Barkhouser did.

Q. At the time that deed was drawn, state whether or not any paper was produced purporting to be a power of attorney from Betsy Jones to her husband, Thomas Jones.

MR. LEAMING: We desire at this time to put upon record the three general objections made at the outset, together with the sup-lemental objections that the testimony of this witness is incompetent to establish this as a fact until it is shown that witness, from pos-tive memory, can testify to the existence or execution of the power of attorney which contains all the legal requisites of conveyance of land, properly executed by proper officer of law duly and properly authorized to execute same.

COURT: Objection overruled. Exception allowed.

A. I saw power of attorney executed by Betsy Jones, authorizing Thomas Jones, her husband, to sell all her real estate in Whatcom

county. I am not pos-tive whether it was all real estete in
36 Washington Territory or merely in Whatcom county. All I was interested in was to see whether it covered the tract of land that I was purchasing at the time, and it did so.

Q. State what interest you had at that time in ascertaining the existence of a power of attorney, and all of the circumstances attending the investigations you made on that subject.

Mr. LEAMING: To that question we desire to interpose the objections heretofore stated as to relevancy of testimony, and specifically thereto, in addition, to urge the incompetency of any testimony as to circumstances attending the transaction.

COURT: Objection overruled. Exception allowed.

A. I was purchasing a tract of land which I knew, of my own knowledge, his wife has equal interests in, and I had sense enough to know that her signature was necessary for a valid deed, and he informed me he had a power of attorney from his wife to sign her name.

Q. Then what, if anything, was done about the production of power of attorney after he told you he had it?

A. I asked him to show me the power of attorney, and he did so.

Q. Did you make examination of the instrument at that time?

A. I did.

Q. What was the result of that examination, as to the execution of the power of attorney and substance which it contained?

Mr. LEAMING: The same objections are interposed to question without renewing my objections each time.

COURT: Objection overruled. Exception allowed.

A. It satisfied me that it contained the requisites that power of attorney is supposed to have by law—witnesses, officer,
37 with seal.

Q. By whom executed?

A. That I can't remember.

Q. By whom signed? I don't mean what officer.

A. Betsy Jones.

Q. Where was Thomas Jones at the time you made this purchase and received this deed—where was he living?

A. He had been absent from Bellingham Bay for some time and had returned. He had been in British Columbia some one or two years.

Q. After you made purchase of this property what did you do with the property, in relation to taking possession of it?

Mr. LEAMING: Now, to that question we desire to offer the objections made to any testimony relating to adverse possession which was stated at the outset of the case, if the court will waive the repetition of them at this time.

COURT: Yes; and objection overruled and exception allowed.

A. When I received deed from Thomas Jones I asked him to go with me and show me what there was. I went with him. We

went into the house where he had lived while he was perfecting his title; showed me the amount of improvements, and walked over the premises and gave me possession of the property and turned it over to me, and I believe my right to it has never before been questioned by any one.

Q. When was that, with reference to the time the deed was made, that Jones turned over possession to you?

A. Same day I received the deed.

Q. What did you then continue to do, if anything, with
38 relation to the possession of the property and exercising ownership over it?

Mr. LEAMING: Same objections are made to this question.

COURT: Objection overruled. Exception allowed.

Adjourned until Monday, 10 a. m., January 18th, 1892.

Morning Session.

EDWARD ELDRIDGE recalled to the stand.

And examined by Mr. THOMPSON:

Q. After you had purchased the Jones claim, what did you do in relation to taking possession of it and in relation to maintaining your possession? I believe you stated possession was surrendered to you?

Mr. LEAMING: To this question, on behalf of defendant, we interpose the same objections that were specifically stated at the outset with reference to any testimony relating to adverse possession.

COURT: Objection overruled. Exception allowed.

A. I entered or gave persons the privilege of occupying portion of the premises at different times. I gave people privilege to cut timber on it a great many times. In those days shingles were quite an important item in the way of people making a living. On this land there was a great deal of timber, and a great many people applied to me to make shingles on that land, and I gave them permission to do so.

Q. Was there any portion of this land claim under cultivation, either as a garden or otherwise?

Mr. LEAMING: We interpose the same objections already
39 stated and, in addition, the further objection to all testimony of this class, unless it is specifically stated by witness what portion of the land he had reference to.

COURT: I will sustain the objection with reference to *what* portion of the land, and give exception.

A. There was a small portion of it under cultivation as a garden.

Q. On which half of the donation claim was this garden?

A. On the west half.

Q. On the wife's half?

A. No.

Q. On the other half?

A. Yes, sir.

Q. What was the condition of the other half of the donation claim?

A. It was all timber land.

Q. From which part of the claim was this timber taken—that which you gave these parties permission to have?

A. I presume the same was taken off the whole tract; I cannot say to my knowledge.

Mr. LEAMING: We wish to strike, on the grounds that the witness has not testified to his absolute knowledge, as was shown by his answer.

COURT: I will strike out that part.

Q. How much timber, if any, was taken from the claim to be used in the coal mines here?

Mr. LEAMING: The same objection is interposed as heretofore, and especially the objection that it is incompetent unless the
40 question is limited to, first, the land in controversy, and, second, unless the answer disclose on what portion of the land in controversy the timber was taken, and, third, unless the time is fixed.

COURT: I will permit the question, and exception allowed.

A. It is impossible for me to give any idea about the quantity. From the time I obtained possession of that land until the coal mines stopped operations there was continually some one asking to cut props of a certain size that were used in the mines. There was a great deal of that timber on this land and it was very close to the mines. I can't remember how many or what extent. I think I was paid for some of it, but at that time timber was very valueless and I was willing to oblige any one. I had reasons for trying to make myself popular with the community at large, and if a man asked me a favor I never hesitated to grant it, unless it was something that very few people would do. As to cutting timber, I don't remember of ever refusing any man to cut it, whether I got paid or not.

Q. State whether or not either Thomas Jones or Betsy Jones or any person has ever been in possession of that property since you obtained your deed for it, excepting such persons as have been on the property with your permission and consent.

Mr. LEAMING: The same objection is interposed, with the additional objection that the question as framed embodies a legal conclusion and calls for a legal conclusion as an answer.

COURT: I will permit the question and give exception.

A. No person was ever in possession of any portion of these premises without my consent from the time I obtained the deed.

Q. Who has paid the taxes on that property since 1862?

41 Mr. LEAMING: To that question we desire to interpose the same general objection- heretofore enumerated at the outset

of the case, and to add to them the further specific objections that the payment of taxes or the testimony in relation thereto is incompetent, as irrelevant and immaterial; in fact, it is incompetent as evidence to establish the fact of possession and is inadmissable in evidence as such. Further, that the parol proofs of the payment of taxes, even though admissable in evidence to establish facts, is not the best evidence.

Objection overruled and exception allowed.

A. I have.

Q. Was the coal mine being operated and the timber being used in it at the time you made purchase from Thomas Jones?

A. Yes, sir.

Q. How long did it continue to be operated after that time?

Mr. LEAMING: Same objections.

COURT: Objection overruled and exception allowed.

A. It continued in operation until 1878.

Q. During all of that time was timber taken as it was needed?

A. A greater portion of it.

Q. With your consent, was it taken from this property?

Mr. LEAMING: To that question we interpose the same objections, which we will not re-enumerate, and the additional objection is that it is leading in form.

COURT: I will sustain the objection.

Q. You may state what the fact is in relation to timber being taken from the Jones claim and from the west part of the claim to be used in the coal mines from 1862 to 1878.

42 Mr. LEAMING: To that question we interpose the same objections that were enumerated to a similar question a few moments ago.

COURT: Objection overruled. Exception allowed.

A. I can give no positive information as to what part of the land the timber came off. Every one I gave permission to had permission to cut over the whole 320 acres. It would only be natural that every one would cut it where they could get it easiest. I never followed any one; every one was free to go and cut as they pleased; nor did I keep any list. The lapse of several years may have transpired without taking off any. They were used both in the manufacture of shingles and props.

Mr. LEAMING: We now make a motion to strike the testimony of witness where he states that he gave permission to several parties to cut timber, unless the witness is able to testify that the parties to whom he gave permission acted upon that permission and cut timber under that permission. To the testimony that the witness stated that he cannot so testify entitles us to motion to strike.

COURT: Objection overruled. Exception allowed.

Q. Has either Thomas Jones or Betsy Jones or any of the persons

of whom it is claimed made deeds to the defendant Dibble or Mr. Dibble himself ever been in possession of that property since the year 1862?

Mr. LEAMING: Our objection is that it embodies a legal conclusion and calls for a legal conclusion, together with the same general objections that were made at the outset.

43 COURT: Objection overruled. Exception allowed.

A. To the best of my knowledge, they were never on the land. Thomas Jones and Betsy Jones, of course, were, but other persons than these I spoke of were never on the land.

Q. How about the defendant Dibble has he ever been in possession of that property?

A. In one measure he was, on a portion of it. I gave him a deed, which he accepted from me, on a small portion of the wife's half of this property.

Mr. LEAMING: We move to strike the last portion of the answer on the ground that it is not the best evidence; and, further, that it is immaterial, in that by the pleadings the land which witness refers to is not a portion of the land in controversy.

COURT: Motion denied. Exception allowed.

Q. Was the property described in that deed which was introduced in evidence, and in which Mr. Dibble was one of the grantees, on the wife's — of the donation claim?

Mr. LEAMING: To that question we interpose the ob,, ction that it is incompetent under the issues as framed; and, further, that it is not evidence of facts, either of the conveyance or location of the land.

COURT: I will permit the question with the understanding that I will pass on it same as the others. Objection overruled. Exception allowed.

A. About $\frac{11}{12}$ of it is on the wife's half. It is a strip in the deed described twenty (20) feet wide at back end and one-half ($\frac{1}{2}$)
44 mile long, and comes to a point at the front end of west half, so that almost ten or eleven twelfths of the land is on the wife's half.

Q. When did you first hear that the defendant Dibble or any one else make claim to this land?

Mr. LEAMING: We make the objection on the ground that it was immaterial when the claim of the defendant Dibble came to the knowledge of the witness.

COURT: Objection overruled. Exception allowed.

A. It was only a few months ago since I heard Dibble had any claim on the property.

Q. When did you first hear that any other person made any claim, or did your ever hear?

Mr. LEAMING: Same objections as before.

COURT: Objection overruled. Exception allowed.

A. I never heard of any other person claiming any ownership.

Q. Was your title ever questioned by any one up to the time of the commencement of this suit?

Mr. LEAMING: Same objection.

COURT: Objection overruled. Exception allowed.

A. Not that I know of.

Q. What is the present condition of the property with reference to its being timber lands or cleared?

Mr. LEAMING: Same general objections made to adverse possession.

Mr. BLACK: The general objections heretofore made as to incompetency of this proof, unless it was specifically stated which portion of the property was testified about, whether the property in
45 controversy, the Betsy Jones property, or the west half, the Thomas Jones property.

COURT: Objection overruled. Exception allowed.

A. About two-thirds, or a little more perhaps, of the west half I had cleared off and platted in a town site. On the east half I had a house built and some cleared off. The water company requested me to give them permission to clear a place for their reservoir.

Q. When was that?

A. Some years ago.

Q. More than ten years?

A. I don't know; they cleared the land off, and whether it is on the Jones claim or not I am not prepared to say. I never asked for a good description of the survey.

Mr. LEAMING: We move to strike that portion of the testimony relating to the acts of the water company, in that the witness is unable to testify to his own knowledge whether such steps were taken or not in the land in controversy, and also to strike that portion relating to the small clearing and house building on Betsy Jones' half of the donation claim, unless the time is settled by testimony of the witness when these acts were done.

COURT: Last part of answer stricken; other allowed to stand. Exception allowed.

Q. Who cleared the land in controversy?

Mr. LEAMING: Same objection.

COURT: Objection overruled. Exception allowed.

A. Do you mean the man that done the work?

Q. No; I mean the man who employed the men and who paid for it.

46 A. I did.

Q. During the time that Mr. Barkhouser owned this land or a portion of it you were his agent, were you not?

A. Yes, sir.

Mr. LEAMING: To that we object, in addition to the grounds al-

ready stated, that it is immaterial and incompetent in that it is leading.

Question changed.

Q. State whether or not Mr. Barkhouser had an agent at the time he owned this property and who was the agent looking after the property for him.

Mr. LEAMING: Same objections as to preceding question.

COURT: Objection overruled. Exception allowed.

A. Mr. Barkhouser became the owner of the undivided half of that property some fifteen or sixteen years ago—I can't say exactly without referring to the deed—and from the time he purchased I have been his agent, looking after it.

Q. State whether or not you are in any way connected with the plaintiff, The Bellingham Bay Land Company, in this case.

A. I am one of that company.

Q. What position do you hold in the company?

A. I am president of the company.

Q. Who has been looking after the interests of the Bellingham Bay Land Company, this particular property, since it became the purchaser of the property?

A. I presume I have had as much to do with it as any one.

Q. After you became a purchaser of that property state whether or not the people in the community here generally recog-
47 nized you as the owner of the property from 1862 until about the time of the commencement of this suit.

Mr. LEAMING: To that question we desire to interpose the objection, in addition to those made in the outset, first, that the question is vicious in form, in that it assumes as a fact the purchase by witness; second, that the reputation or general repute in the community as to ownership of the land is incompetent as proofs to establish either the possession or title; third, that such a title has no foundation for suit to quiet; fourth, that no sufficient foundation is laid to enable or entitle this witness to testify of matters of general repute.

COURT: Objection overruled. Exception allowed.

A. Every stranger that ever came to me for anything relative to that property always told me they understood I was the owner of the property, and of late years application has been made very often—scarcely a week or a day passes but what some one comes to me and wants something about that property.

Mr. LEAMING: It is understood that a part of the objection was that the question was not specific to separate the Thomas Jones claim from the Betsy Jones claim. I am not sure whether I included that in my objection or not.

Q. How has it been with reference to this matter during the ten years next preceding the commencement of this suit?

Mr. LEAMING: Same objection.

COURT: Objection overruled. Exception allowed.

A. I have given permission to at least a dozen people to put up buildings and live, and either purchase the ground on which
48 the building stood or move when requested to do so. I believe there are ten or twelve such buildings on the land.

Q. Have any street improvements been made on the west half of this land?

Mr. LEAMING: We object on the grounds stated, and more especially that acts regarding the west half are not material in this case.

Q. I intended to ask if any street improvements had been made on the east half—any roads or public highways made upon the east half of this claim?

Mr. LEAMING: We object on the ground that it is immaterial, and on the ground heretofore stated to the effect, and, furthermore, that it does not relate to the time when such improvements were made.
COURT: Objection overruled. Exception allowed.

A. I think the railroad runs through the east half; I don't swear this pos-tively, but my impression is that it does; I gave permission to make that railroad.

Mr. LEAMING: We interpose a motion to strike that answer on the ground that the witness, or his answer, discloses that his knowledge is not perfect as to the fact, and testimony in its present form is not the best or sufficient evidence of the fact.
COURT: Objection overruled. Exception allowed.

Q. There are no street improvements on that property?

Mr. LEAMING: Same objections, your honor, as moved on preceding question.
49 COURT: Exception allowed.

A. I don't think there is.

Q. There are street improvements on the land, but not on the east half?

A. Yes, sir.

Mr. LEAMING: Same objection, and especially the objection that the west half is not in controversy in this case, and any acts in reference to that are incompetent in this case.
COURT: Objection overruled. Exception allowed.

A. One street is planked clear across the property. I paid for the road, except what portion the city paid.

Q. Has the defendant ever paid any taxes or had the property assessed, either east half or west half?

Mr. LEAMING: To that question we interpose the objection that it is incompetent and irrelevant and immaterial and not the best evidence, and is no evidence to establish any fact material to the issues.
COURT: Objection overruled. Exception allowed.

A. I don't think he ever paid a dollar of taxes. I paid them up to the present time, and I did not suppose any one receives taxes for the same property from two different persons.

Cross-examination.

By Mr. BLACK:

Q. Captain, I believe you stated that you were president of the plaintiff company, did you not?

A. Yes, sir.

50 Q. You also have a large interest—stock interest—in that corporation, have you not?

A. I have about one-eighth—no, as near as I can judge, one-eleventh.

Q. Mr. Bartlett has an interest in that company, too, has he not?

A. Yes, sir.

Q. Mr. Bartlett, who has an interest in that company, and yourself are the identical Mr. Bartlett and Edward Eldrige who executed warranty deed introduced in evidence in this case to the property in question, are you not?

A. Yes, sir.

Q. I think I understood you to testify on Friday that Thomas Jones and Betsy Jones went to British Columbia from here?

A. I stated that I thought that they went to Port Townsend from here, and from Port Townsend to British Columbia.

Q. Do you know when they went to British Columbia?

A. Not to the day, but in the year 1860 or 1861.

Q. They were living, I believe, at the 145-mile Post house, were they not?

A. I can't tell from my own knowledge, but I have information to that effect.

Q. That is as you understand?

A. Yes, sir.

Q. Did Betsy return with Thomas?

A. No, sir.

Q. Do you remember whether the power of attorney was brought here by Thomas, or did he send after it after he got here?

51 A. That I could not tell.

Q. You don't remember the date of that power of attorney, do you, Captain?

A. No, sir.

Q. Do you know whether it was the same power of attorney testified to by Mrs. Peterson on the stand as having been sent for?

A. I do not.

Q. You spoke of a seal on that power of attorney in your testimony?

A. Yes, sir.

Q. Did you refer to the seal opposite Betsy's name or the notarial seal?

A. To the seal of the officer who acknowledged it.

Q. Do you remember his name?

A. I do not.

Q. Was there a seal, in fact, after the name of Betsy Jones?

A. I can't say whether there was a seal after the name of Betsy Jones or not.

Q. Was the notarial seal an impression on the paper, or was it a wafer stuck on and sealed?

A. Too much time has elapsed now for me to remember those details.

Q. Do you feel certain that it was a notarial seal?

A. No, sir; I do not know that it was a notarial seal; it may have been some other officer. The main point I felt interested in, that it was a power of attorney from Betsy Jones covering the part
52 of the land I was to purchase; the details I did not look into. I very often loose through not taking sufficient knowledge of the details of an instrument.

Q. Do you know whether or not it was the seal of any officer?

A. Yes, of some officer.

Q. You knew it was a proper seal without examining it?

A. I examined it sufficiently to find out how I was purchasing.

Q. You testified this instrument was signed by Betsy Jones. Are you familiar with her handwriting?

A. She did not write, sir.

Q. Then this deed was signed by her mark?

A. Her name was there in the manner it was in any instrument. Her mark was there.

Q. There must have been witnesses to that mark, were there not?

A. Not necessarily.

Q. Then there were no witnesses to this instrument?

A. Yes.

Q. Were there? Do you know how many?

A. Whether there was one or two, I can't say, but I was satisfied at the time that all the law required was there.

Q. Do you remember the names of these one or two witnesses?

A. No, sir; not even of the officer.

Q At that time, what was the value, per acre, of that Jones claim?

A. Very little, sir. It would be impossible for me or any one else to state what that land was worth or would have sold for at sheriff's sale, because no one could tell whether Jones has any title to
53 it or not. I will state the reasons: The law gave certain conditions upon which any one could acquire a title to a tract of land—what is called the donation law; any one who complied therewith would have no difficulty, but at that time very few complied with the law and very few of the settlers, donation settlers, got a title to the land, and Mr. Jones was one of these, and it was very doubtful whether he would get a patent or not.

Q. How much consideration paid for that property?

A. Three hundred dollars ($300).

Q. Jones was indebted to you, was he not?

A. Very little.

Q. That was settled in the final deed?

A. Yes, sir.

Q. And was part of the three hundred you refer to?

A. Yes, sir.

Q. How much was that indebtedness, Captain, do you remember?

A. I do not remember; it was a small sum, not exceeding twenty-five dollars, if it was that much.

Q. The remaining portion was paid how?

A. When I purchased the property I paid fifty dollars and gave my note for two hundred and fifty dollars. This small matter you alluded to was included.

Q. You paid that note subsequently, did you?

A. I did.

Q. Whose order was that note made to?

A. Thomas Jones.

Q. I understood you to say that the east half of this claim was owned by Betsy Jones and the west half by Thomas Jones, did I not?

54 A. Yes, sir.

Q. Was there many people living here in the year 1862 and about that time?

A. A great many living before that time, but very few at that time.

Q. Where was Thomas Jones living at that time?

A. When?

Q. At the time you purchased, in 1862.

A. I presume his home would be properly in British Columbia; he had just come from there.

Q. What I refer to was, did he live at the cabin or was he living at some other place about town?

A. I can't tell now, at the lapse of thirty years, what house he lived in.

Q. Had you ever been up to see the claim at the time his wife was living there?

A. Yes, sir; several times.

Q. Quite familiar with the property, were you not?

A. Yes, sir.

Q. You own considerable property in this county—purchased considerable at different times?

A. Yes, sir.

Q. What is your habit about examining; do you examine a piece of property before you purchase it?

A. No, sir.

Q. Never do?

55 A. No, I can't say I never do; I have bought several thousand acres of land without ever seeing it and never being on the land.

Q. As a general fact, you are familiar with the lay of the land in this county and know the lay of all of it?

A. Yes, sir; I should; I have been for thirty or forty years a resident of it.

Q. It is not your custom, then, in making a purchase to at once

go with the grantor and have him put you in possession of the property, as a rule?

A. I generally almost always do, if I am buying of an individual. If I am buying of the United States, there is no such ceremony gone through.

Q. Do you deem that an essential transfer of title?

A. I think so; it is considered so.

Q. What was the means of getting to the Jones cabin from the Bay? What were the means? What direction did you approach?

A. There was a road that went up from the coal mines at that time. I don't know whether you would call it a road today; trail is the name given for our first road.

Q. Then you would start from a point west from the cabin and go eastward until you came to it?

A. Yes; easterly.

Q. You state that there was some question about Jones complying with the law. Do you mean that he did not make any substantial improvements on it?

A. The law requires to live and cultivate for the period of four years.

Q. What was the character of the ground on which his cabin stood?

56 A. His cabin stood on that ridge.

Q. How much a place did he have cultivated there?

A. Not to exceed one acre.

Q. What portion of that ground was — cabin situated on, with reference to north, east, south, and west?

A. On the west portion.

Q. What was the character of cultivation there?

A. Garden. What manner do you refer to as character?

Q. Was it well cleared or natural clearing?

A. The garden was well cleared; it had to be cleared before he could raise any vegetables in it.

Q. Was it fenced in?

A. Yes, sir.

Q. Had there been heavy timber there?

A. Yes.

Q. Was that cleared off?

A. Yes, sir.

Q. Stumps been removed?

A. I think not; smaller ones I presume had, but I don't suppose the large ones were.

Q. The portion of the ground that -as within the enclosure had been heavily timbered ground?

A. Yes, sir.

Q. You came here in 1853, I believe?

A. Yes, sir.

Q. From that time up to 1863 and 1865 I understand you were taking up a donation claim and improving it?

A. Yes, sir.

57 Q. Prior to your coming here you were a sailor, were you not?

A. Yes, sir.

Q. That had been a means of your procuring a livelihood?

A. Yes; until the gold mines were discovered in California.

Q. Then you worked in them?

A. Yes, sir.

Q. How far, Captain, is it from that cabin to the westerly half of westerly line of the east half of the Jones donation claim—that is, how far from that cabin is the northeast point of the Betsy Jones half?

A. Well, I can't give you a positive answer; the claim is a mile long, about one-half mile wide, and a little irregular. I would have to measure it before I could give you the distance.

Q. In the neighborhood of half a mile?

A. Yes, sir.

Q. What was the character of the timber on the two halves of that claim in 1862, was it heavy or otherwise?

A. The character of the timber, generally, was heavy.

Q. Any trails cut through?

A. None but Indian trails.

Q. Any wagon roads?

A. No, sir.

Q. When was the town site where Sehome now stands, in New Whatcom, westerly of these claims, cleared off first?

A. They were cleared off in the first settlement in 1853.

Q. At what date were the *too* claims cleared in such a way that the clearing extended up to the westerly half of the Jones
58 donation claim, as near as you can remember?

A. Seven or eight years ago.

Q. And prior to that time it was heavily timbered, even west of the Jones donation claim?

A. Yes, sir.

Q. Any wagon roads up to the claim?

A. None prior to that time.

Q. None prior to seven or eight years ago?

A. No, sir.

Q. How far was the coal mines that you refer to—that is, the opening—from the westerly limit of the Jones donation claim?

A. From the beach, 540 yards to the northeast corner of the Jones donation claim.

Q. And that coal mine was at the beach, I understand?

A. Yes, sir.

Q. That distance was covered with timber, was it not, between that and the Jones donation claim?

A. Yes, sir.

Q. Who owned these coal mines?

A. A company known as the Bellingham Bay Coal Company.

Q. During the time that that company owned this, who owned the land situated between this land and the donation claim?

A. That company owned it.

Q. The company owned it?
A. Yes, sir.
Q. Are you an attorney-at-law?
A. No, sir.
Q. Were you ever on this east half of that claim—that is,
59 Betsy's Jones' half?
A. Yes, sir.
Q. When?
A. Often. I could not tell you how often. I could not give you *and* single date.
Q. How early do you suppose you were there before you got the deed you speak of?
A. I can't say whether I was there before I got the deed or not, but I went all over the claim shortly after.
Q. The time that you and Thomas Jones went up to the cabin, you did not go over the claim that day, did you?
A. Yes, sir; we went that day all over the claim.
Q. After that you went by yourself over the claim?
A. I can't say just whether I went for the express purpose of going over it. The settlers generally went out shooting occasionally.
Q. How was the Utter claim in those days; was it heavily timbered?
A. Yes, sir.
Q. Any roads?
A. No more than I stated before—Indian trails.
Q. How about the Vail and Fitchue claims?
A. Same way.
Q. I suppose the Peabody claim was largely the same way?
A. Yes, sir.
Q. Then, Captain, I understand that all the claims lying westerly of the Jones claim were heavily timbered?
A. Yes, sir.
60 Q. Was there any means of access to the Jones claim from an easterly, northerly, or southerly direction other than traveling through the thick woods?
A. No. There were Indian trails here and there through the country and not many of these, and this was the only way of getting to any of these claims.
Q. I understood you to say you made written leases to this property?
A. No, sir; I never made written leases.
Q. What was the object, Captain, of any person desiring to occupy any part of the Jones donation claim?
A. As I stated before, some parties wanted the privilege of making shingles. I think two different people got privilege of keeping house and cultivating garden, and I think some of the miners got privilege of using a garden.
Q. When you speak of giving privilege of using you refer to the garden and the house?
A. Yes, sir.

Q. At any time prior to 1885—prior to the time of last boom?
A. Yes.
Q. Shingle business carried on to large extent in early days here, Captain?
A. About one of the main sources of any one making money, except those who worked in the coal mines.
Q. How were they cut—split, or did they saw them?
A. Split or shaved shingles.
Q. Shipped away in large quantities or small?
A. In small quantities. My recollection is that the coal
61 ships carried some down to San Francisco.
Q. How was the timber at that time; was it valuable, Captain?
A. Not very.
Q. As a matter of fact the work of cutting shingles was usually done by individual men as a means of livelihood for themselves, was it not?
A. Yes, sir.
Q. As a matter of fact, then, they usually did their work where they could most conveniently cut the shingles, did they not?
A. Yes, sir.
Q. There was no objection by any of the old settlers to their using timber for that purpose?
A. I can't answer for any one else. There was no objection on my part.
Q. You have never received any pay for these shingles from these parties?
A. My impression is that I did receive pay for props.
Q. That was for the coal company?
A. Yes, sir.
Q. I mean from individual men who were out cutting shingles?
A. I can't say pos-tively whether I did receive pay or not.
Q. At that time I understood you to say that you were acting in a way that would get confidence and that would in no ways injure yourself in the estimation of people?
A. Yes, sir.
Q. Presumably you would not have charged for any shingles?
A. No, sir.
Q. Do you know where any person ever cut any shingles;
62 what point or part of the claim, by actually seeing them?
A. No, sir; I can't tell; I can't testify to that—to what part.
Q. Do you know how many shingles were cut?
A. No, sir.
Q. Do you know how often shingles were cut?
A. No, sir; I can't tell you how often.
Q. You were speaking of props, Captain; by whom were they cut or for whom were they cut?
A. By various parties. The coal company, I understand, generally gave contracts to different parties, and these contractors would go and cut them wherever they could get them easiest.

Q. How were they carried to market—by teams, ox teams, or were they carried by hand?

A. A great many were carried by hand; 5, 6, or 7 feet long and 8 to 12 inches through, as near as I could judge.

Q. Some were carried by ox teams or wagons?

A. How they were got I can't say. I believe there were ox teams in our neighborhood then.

Q. How did you know any one ever got them; did you see them?

A. Yes, sir.

Q. Where did you see them cutting them?

A. I seen parties coming down to the beach.

Q. How far into the timber can a man see; is it such a heavy timber that you cannot see a long distance?

A. If the underbrush is cleared you can see quite a distance contiguous to the bay here. The most of the underbrush was cut off.

63 Q. How far back?

A. I can't say how far.

Q. Two hundred yards?

A. Yes; more than that.

Q. That timber was carried by ox teams *by* the saw-mill?

A. Yes.

Q. In fact, ox teams were the usual method of hauling timber?

A. Of hauling timber.

Q. You spoke of the house that was now standing on the east half of this claim.

A. Yes, sir.

Q. Do you remember when that house was built?

A. Last spring.

Q. Any house ever there until last spring?

A. No, sir.

Q. You spoke of the water company clearing a piece of land in that neighborhood.

A. Yes, sir.

Q. Do you remember when that was?

A. I think it was three years ago, to the best of my knowledge.

Q. You also spoke of certain houses and lots that you had constructed or allowed people to build, with the understanding that they should buy the same after the house was built. How long ago has that been, Captain?

A. Within the last five years.

Q. On which part of the claim?

A. The west half.

Q. Altogether on the west half?

A. Yes, sir.

64 Q. You spoke of a certain clearing that you had done on this Jones claim. All that was on the west half, was it not?

A. No, sir; not all of it.

Q. All except a little house?

A. When I put this little house up it was for the purpose of clearing.

Q. That was last spring?

A. Yes, sir.

Q. All that clearing was done on the west half?

A. Yes, sir.

Q. The west half is property that you understood the Government had given to Thomas Jones?

Adjourned until 2 o'clock Monday, January 18th, 1892.

Afternoon Session.

Mr. BLACK resumes cross-examination:

Q. Captain, was there any material difference in the character of the timber on the east half from the west half of the Jones donation claim prior to the cutting of the timber on the west half?

A. I think there was more on the west half than on the east half.

Q. I refer to the size and character of the growth—whether it was of the same species.

A. I have never examined sufficiently to give an accurate answer to that question.

Q. What character of timber was used in the making of the props you spoke of used in the coal mines?

A. Cedar.

Q. That required large or small trees?

65 A. Small, but large could be used by splitting them up. My impression was that some split props were used as well as round ones.

Q. Do you recollect any particular spot from where you saw timbers taken for these props on that claim?

A. No, sir.

Q. You of your own knowledge, then, are unable to state whether or not much timber was taken from the east half?

A. I can't state positively.

Q. I presume it would have been taken from the part that would have been most convenient for the person seeking, would it not?

A. That is the natural inference.

Q. Was such material of much value at that time—uncut, I mean?

A. Yes; I presume it was, more or less; it would be a hard matter to put its exact value.

Q. I mean for a market value of any considerable amount, or was it a character of material that any person would allow taken from their claims in a reasonable amount, as a matter of convenience for the person seeking?

A. I think any one here at that time would have allowed any one taking such timber from their claims at a small amount.

Q. Was it the habit of persons cutting shingles or props to obtain

permission or make leases from parties owning the land for that privilege?

A. It certainly was the custom to obtain permission.

Q. In giving permission I don't suppose any particular part of the Jones claim was designated?

A. No, sir.

66 Q. There was never any mention of the right to take from the entire tract of 320 acres *as* distinction from the entire tract of 160 acres, was there?

A. Whether there was any positive statement made to that effect I cannot remember.

Q. I suppose it was in the nature of a request?

A. Exactly.

Q. To such a request you would never refuse?

A. No, sir.

Q. As to whether or not any were taken you have no positive knowledge; have never seen any taken?

A. I have seen trees cut down.

Q. Do you know by whom?

A. I can't tell the names of the parties; by going over the land you could see very readily whether any timber had been cut or not, either for shingles or not.

Q. You spoke of paying taxes, Captain. Was the whole of the Jones claim assessed in your name?

A. Yes, sir; sometimes in Jones' name; sometimes in mine. I would have to go over the assessment-roll to give you a true answer. I paid the taxes; I can answer to that.

Q. You are not able to state whether it was assessed in your name or not, as a whole—that is, from the year 1862 to now?

A. My impression is that it was assessed as the Jones donation claim, containing 320 acres; that is my impression, and upon that 320 acres I paid the taxes from 1862 to the present time.

67 Q. Could it have been possible that it was assessed as one-half of the Jones donation claim, containing 160 acres, to you?

A. I don't remember of anything of that sort occurring.

Q. You are not certain that that is not a fact?

A. I can't swear positively that that is not a fact.

Q. It was according to the assessment that you paid the taxes, was it not?

A. Yes, sir.

Q. I think I understood you to say, Captain, that this power of attorney you spoke of was executed by Betsy Jones while she was in British Columbia?

A. That is to the best of my knowledge.

Redirect examination.

By Mr. THOMPSON:

Q. Captain, you have examined the certificate of the acknowledgement of the officer who took the acknowledgement of Mr. Jones to that deed?

A. Yes; I examined it.

Q. State how the officer came to certify that the power of attorney from Betsy Jones to Thomas Jones was produced to him.

Mr. LEAMING: To that question we desire to interpose the objection, in addition to the immateriality heretofore urged to all testimony relating to the power of attorney, that the question is directed to a matter that must of necessity be wholly beyond the scope of the knowledge of the witness, as it is directed to the notion that led the officer to formulate a certificate in the manner in which we find it, and is in no event competent to prove.

COURT: I will permit the question if he follows it up, and
68 give exception.

A. That was done at my request, and the reasons for it were these: While Mr. Barkhouser was writing out the deed I stated to Mr. Jones that I wanted a power of attorney. His answer was that he was not yet done with it; he had more property to sell, and when he was done with it I should have it. I knew he had property in Port Townsend and imagined he wanted to use it there. I immediately asked Mr. Barkhouser to make some statement of this acknowledgement that he had seen this power of attorney. I did not know that it was absolutely necessary to have power of attorney recorded and I made that request of him, and he done so, and after he had written it he asked me if I was satisfied, and I said yes. I did not ask him for power of attorney when he returned, as I considered that good authority.

Mr. LEAMING: We make motion to strike testimony made by witness in answer to the leading question, on the same objections that were raised on the asking of the question, and on the additional grounds that it is in no ways in response to the question, and the testimony in regard to the time of the transaction and statements made by the acknowledging officer, by Mr. Jones, and this witness' conversation at that time are inadmissable as incompetent as evidence in this case.

COURT: I will have to strike out part of that, at least. I will strike out what Mr. Jones said. I will permit the question to show if he saw the power of attorney, if he saw the power of attorney which was presented at that time. I will let it stand as far
69 as that goes. Conversation with Mr. Jones I will have to strike out. I will allow an exception.

Q. When did you first learn that it was necessary, in order to make a complete record of title, that this power of attorney should be recorded?

Mr. LEAMING: We object to the question as immaterial as to the time when witness first became acquainted with the fact that such an instrument should be recorded, as well as the other general objections to other testimony relating to this power of attorney.

COURT: Objection overruled. Exception allowed.

A. About six years ago.

Q. What steps, if any, did you take or cause to be taken for the purpose of correcting that mistake?

Mr. LEAMING: To this question, before it is answered, I desire to renew the same general objections to the evidence of witness as to power of attorney that was stated at the outset of trial, and the further objections that this witness was recalled for the privilege of asking a question overlooked, and the examination is now found to be extending into a very extended department of the issues and matters in investigation and clearly beyond the scope that we think the court should permit the calling of a witness after his testimony has been closed. Further, on the ground that it is immaterial, under the issues, what steps the witness has taken.

COURT: I will let him answer the question, but will not pass on it at this time; permit question and allow exception.

A. As soon as I found it necessary to prove power of attor-
70 ney should be recorded I immediately went to Port Town-
send, as I thought most likely place it would be recorded, and examined personally and had others do so, and I went to British Columbia and had others employed to endeavor to find all the officers who would be likely so issue any documents, if any record could be found, and failed to do so.

Q. State whether or not you instituted any proceedings to perpetuate the testimony of the existence to that power of attorney.

Mr. LEAMING: We object on the same grounds urged to the last question, and the additional grounds that any proceedings that have been instituted to perpetuate such testimony of such instrument the record will be the best evidence of it.

COURT: Objection overruled and exception allowed.

A. I had an attorney make applications to the district court of the Territory to appoint a commissioner to take testimony in the matter.

Mr. THOMPSON: I will offer a certified copy of the record of that case, although I have not got my copy here in court. It is not quite completed yet. I desire to offer it while witness is still on the stand. I will deliver it to the reporter, to be filed at a later time.

Mr. LEAMING: We object to the offer to which counsel refers on the ground, in addition to the general grounds relating to the proofs of the existence of a power of attorney heretofore stated, that there is no statute for proceeding at law that will sustain as a judicial pro-
ceeding the matters set forth in the record offered; that no
71 jurisdiction of the case was gained in that proceeding of such a character as to give force to findings as evidence against the defendant in this case; that the proceedings thus disclosed upon their face that they were not of such a character as are sufficient for evidential purposes, and for the further reason that the proceeding, as a record discloses, was entirely an *ex parte* proceeding, with no opportunity to cross-examine or have witnesses cross-examined;

and, further, also that the same witnesses, as record shows, who have appeared and testified in that proceeding have been sworn and examined fully in this case, and for the further reason that the proceedings which are offered have never been filed or made a part of the record of this court or any authorized department of the records of this county.

COURT: I will pass on it the same as the others and allow exception.

And now allows the same and gives an exception.

Mr. THOMPSON: I should accompany this offer with the statement that this record is not being offered because of any substantial conclusion of the rights of anybody, but we have been charged with sleeping on our rights, and in the first series of objections it was stated why we could not recover in this case was that we had allowed this matter to go on so many years without doing anything, and charge that we were estopped. I don't care how defective that record proves or how the court shall acquire jurisdiction, it is offered for the purpose of showing that Captain Eldridge was taking such steps as he could.

COURT: I will sustain the objection and give exception.

Mr. THOMPSON: I will file the record with the reporter as
72 soon as I can. I will offer in the same way, not having the papers present, a certified copy of the assessment-rolls of Whatcom county, as showing the assessment and valuation of the Jones claim during each of the years, extending from this time backward to the point beyond ten years prior to the commencement of this suit.

Mr. LEAMING: To that offer we make the same objections as were made to the testimony in regard to payment of taxes, namely, that in addition to the general objections that were offered at the outset of the trial in relation to adverse possession, and further objections that no payment of taxes or assessment of taxes to an individual or by an individual is evidence of possession, either standing alone or in connection with other circumstances, unless it be an actual *pedis possessium*, and in no other case is payment of taxes against land held to be admissable, and we object to it as evidence upon that ground.

COURT: Objection allowed and exception given.

Q. Have you been able to discover the whereabouts of this power of attorney you have referred to or do you know now where it is?

Mr. LEAMING: We enter to that question the same objections that we have before to this testimony with reference to the power of attorney.

Objection overruled. Exception allowed.

A. I have no knowledge what became of it, sir.

Recross-examination.

Mr. BLACK:

Q. You stated a moment ago that some six or seven years ago it came to your knowledge about this power of attorney being necessary to be recorded; do I understand you right?

A. Yes, sir.

Q. Captain, where did Thomas Jones die?

73 A. In Bellingham Bay.

Witness excused.

Mr. WM. SMITH, the witness, being produced, duly sworn, and examined, testified as follows:

Examined by Mr. THOMPSON:

Q. What is your given name?

A. William Smith.

Q. Where do you live?

A. Seattle.

Q. Have you ever lived here on Bellingham bay?

A. Yes, sir.

Q. When?

A. I lived here in the spring of '60 until '68 and at difference times since.

Q. Were you acquainted with Captain Eldridge during that time?

A. Yes, sir.

Q. Did you know Thomas Jones?

A. Yes, sir.

Q. Did you know Betsy Jones, his wife?

A. Yes, sir.

Q. Do you know where the land commonly known as the Jones claim is located?

A. I know where it is located, but not much about it.

Q. You were once the husband of the old lady who testified here a few moments ago?

A. Yes, sir.

Q. You were at that time?

A. Yes, sir; at that time.

Q. What do you know, if anything, about Thomas Jones

74 having obtained a power of attorney from his wife, Betsy Jones?

Mr. LEAMING: To that question we make the same objections that were enumerated at the outset of the case in relation to the existence of this power of attorney and the additional objection and specific objections that proof or any part of contents of the instrument must be preceded by absolute proof of its genuine-ss, due execution, and verity.

COURT: Objection overruled and exception allowed.

A. Well, I was going to buy this property of him, and I told a friend of mine, a lawyer, at that time, and he said I could not do it. This man I mention said I could not do anything until I had power of attorney all right. Thomas got him to write to Betsy Jones and get a power. She sent one down and they looked at it and said it was not right, and they we wrote again and she sent one down and then he said it was right and we accepted it.

Mr. LEAMING: Motion to strike *as* interposed to his entire testimony as to the question on the grounds that the same relates chiefly to a conversation with parties, and we desire to have all that portion stricken —.

COURT: That part relating — conversation with lawyer I will have stricken out; the other part I will allow to stand, subject to being passed upon.

Mr. THOMPSON: State whether or not after the power of attorney arrived it was submitted to the examination of any lawyer.

Mr. LEAMING: That we object to on the same grounds heretofore urged and upon the additional grounds that it is wholly in-
75 competent for a witness to spread upon the records of this court any evidence, any examination of any person, or result of any examination and report of the sufficiency of the instrument by reason of the examination.

COURT: I will let him answer the question yes or no. Exception allowed.

Q. Was it submitted to a lawyer?
A. Yes, sir.
Q. Who?

Mr. LEAMING: Same objections.

A. Doty.
Q. State whether or not you ever saw this power of attorney yourself.

Mr. LEAMING: Same objections.

A. I saw it, but did not read it.
Q. Where was Mrs. Jones living at that time?
A. Living on the Caraboo road.
Q. Is that at the place called 145-mile Post house?
A. Yes; at 145-mile Post house.
Q. In British Columbia?
A. In British Columbia. I saw her afterward myself and she admitted it was right.
Q. Did you have any conversation with Mrs. Jones at any time after that about having sold her property?

Mr. LEAMING: We object to that question on the ground that statement made by Mrs. Jones whether or not she had sold her property, either the property in controversy or any other property, *it* is immaterial under the issues, and especially is it immate-
76 rial unless directed to this property in controversy in this case.

COURT: I will permit the question to see what they expect to show and allow exception.

A. Yes, sir.
Q. When did you have conversation with her?
A. In '63.

Mr. LEAMING: Same objections.
COURT: Overruled and exception allowed.

Q. Concerning this Jones claim?

Mr. LEAMING: Same objections.
COURT: Objections overruled and exception allowed.

A. No, sir; concerning this power of attorney.
Q. What conversation did you have in 1863 with Mrs. Jones about this power of attorney?

Mr. LEAMING: To that we interpose the same objections that we interposed in relation to the power of attorney and the additional objections that statements made by Mrs. Jones are no evidence against this defendant that may be made in reference to the existence of such an instrument.
COURT: I will pass on that objection with the others. Objection overruled and exception allowed.

A. Mrs. Jones, she told me she wrote the power of attorney altogether in Mr. Jones' favor so he could sell the property; she did not want any of that down there, as she was willing for him to sell it all.
Q. Where did this conversation take place?

Mr. LEAMING: Same objections goes to all these questions.
COURT: Objections overruled and exception allowed.

A. Mrs. Jones' house.
77 Q. Did you ever have any other conversation concerning that power of attorney or conversation concerning selling of Jones' claim?

Mr. LEAMING: Same objections.
COURT: Objections overruled. Exceptions allowed.

A. No, sir; I did not.
Q. Do you have any interest in this suit in any way?
A. Not a thing, sir; not anything.
Q. Do you know where the Jones — was in which he resided during the time he was occupying the land claim?
A. Yes, sir; I have been to it with Mr. Jones several times.
Q. Have you been on that claim a good many times?
A. I have been on that land several times.
Q. What was the character of the land and timber, and how much clearing was done on it by Mr. Jones, and what was the condition of the land claim in 1862?
A. They had cleared and fenced it; sandy loam; quite sandy and not very good.

Q. How much timber? I mean how much fencing.

A. To the best of my knowledge, there was an acre, more or less; an acre in fence, I judge.

Q. Was that at the house?

A. Just below the house.

Q. Any barn or anything of that kind?

A. No, sir; no barn at that time.

Q. Any outbuildings at all?

A. No; I can't remember, sir.

Q. What do you remember about people getting timber
78 from the claim in those days?

Mr. LEAMING: Same objections that have been introduced in relation to adverse possession of these premises and further objection that question is not definite as to time.

COURT: Objection overruled. Exception allowed.

Q. In 1862 to 1868 what was the character of the land with reference to its being timbered? What do you know about persons getting timber there?

A. At that time it was customary for any person who wanted to cut timber to either go and ask for it, or otherwise they could cut it at any time, such timber as they would get over there.

Q. Who was understood in the community to be the owner of that land?

Mr. LEAMING: We object to that on the same ground as testimony as to the reputed owner and on the further grounds that there has been no foundation laid for such testimony.

COURT: I will allow him to ask the question and will pass upon it with the others, and permit the same and give exception.

Q. Who was understood in the community to be the owner of the land?

A. At that time Mr. Eldridge was.

Q. You ever seen Captain Eldridge about the land claim of Jones?

Mr. LEAMING: The same objection is interposed as the one heretofore urged, that testimony referring to possession, especially as it does not relate to the half of the Jones claim that is in controversy.

COURT: Objection overruled and exception allowed.

79 A. I have seen him there several times.

Q. To what extent, if you know, was timber taken from the Jones claim to be used in the coal mines during the years from '63 up to '68?

Mr. LEAMING: We object on the same grounds relating to possession of claim and on the same grounds that it does not define the location of the land in question.

COURT: Objection overruled. Exception allowed.

A. They use- to cut props off for the mines at that time.

Q. What kind of timber used for these props?

A. Generally used timber six or eight or nine inches through. Tops of trees or anything that would amount to that size.

Mr. LEAMING: Same objections.
COURT: Objections overruled. Exception allowed.

Q. What do you know about persons who desire to use timber getting permission from Captain Eldridge?

Mr. LEAMING: Same objections.
COURT: Objections overruled and exception allowed.

A. The company bought considerable bolts and sent them to San Francisco.
Q. Did these bolts come from the Jones claim?
A. They came from Mr. Jones' claim.

Mr. LEAMING: Same objection.
COURT: Objection overruled. Exception allowed.

Q. Do you know which side of the land claim they came from?
A. They came from where they could get the clearest and best cedar; most of it was windfall.

Q. After Mr. Jones sold the claim to Captain Eldridge did
80 anybody live on that land claim?

A. Yes, sir; several parties. I could not tell the names.

Mr. LEAMING: We object to that question same as preceding, especially as it does not relate the definite portion of the land or specific time.
COURT: Objections overruled. Exceptions allowed.

Q. Where did parties live?
A. They lived in the place Jones had built; in Mr. Jones' cabin.
Q. About how much of the time from 1862 to 1868 was that cabin occupied by various people?

Mr. LEAMING: Same objection.
COURT: Objection overruled. Exceptions allowed.

A. I should judge it was occupied three or four years, at different times.
Q. Do you know by whose permission and consent people moved into that house and occupied it?

Mr. LEAMING: Same objection.
COURT: Objection overruled. Exception allowed.

A. It was Mr. Eldridge's consent.
Q. During these years from '62 to '68, after Captain Eldridge had become the purchaser of the Jones claim, in speaking of that claim in the community, whose claim was it said to be.

Mr. LEAMING: We object to the question just asked on the same ground urged upon the testimony in relation to possession and ownership, and in addition to these upon the ground that reputation of the fact as to who was spoken of as reputed owner in the com-

munity is not evidence sufficient to establish a title to deter-
81 mine the existence and contents of a power of attorney, as is endeavored to be established in this case, and, further, upon the ground that no sufficient foundation has been laid for the testimony in any event.

COURT: I will pass on that objection with the others. Allow the same. Exception given.

A. Mr. Eldridge.

Q. Who, if anybody, was said to be in possession of the claim by the people who talked of that claim in the community?

Mr. LEAMING: Same objection made to question immediately preceding.

COURT: Objection overruled. Exception allowed.

A. Mr. Eldridge.

Q. How frequently did you hear the ownership and possession of that claim by Mr. Eldridge spoken of?

A. I could not say how many times. Mr. Jones was here himself up to the time he died, and he did not presume to have any control over that place.

Mr. LEAMING: Same objection.

COURT: Objection overruled. Exception allowed.

Q. Did you ever hear of any other person making any claim to any part of the Jones claim?

A. No, sir; I never did.

Mr. LEAMING: We object to this as immaterial under the issues.

COURT: Objection overruled. Exception allowed.

Cross-examination.

Mr. BLACK examines:

Q. Where do you live?

A. Seattle, when I am at home.

82 Q. Who did you come here with?

A. With the boat.

Q. Who was with you?

A. I don't know how many on the boat.

Q. Who went for you, Hugh Eldridge?

A. I don't know whether he came for me or not.

Q. How much did you get for coming here as a witness?

A. I did not get anything.

Q. How much are you promised?

A. I am not promised anything.

Q. How much do you expect to receive?

A. Nothing. I was coming here anyway.

Q. Was any subpœna served on you?

A. I was not subpœnaed here at all.

Q. Came as an accom-odation to Mr. Eldridge?

A. I did not come here for Mr. Eldridge. I came here on my own business.
Q. What is your business here?
A. I suppose that is not a right question to ask me.
Q. Any business other than being as witness?
A. Yes, sir.
Q. Came on a visit?
A. Came on a visit.
Q. Mr. Eldridge come for you?
A. No, sir; he did not.
Q. You came with him?
A. Yes; I came with him.
Q. Did he come to your house?
83 A. No, sir.
Q. Did not Mr. Eldridge go down for you especially?
A. Not to my knowledge.
Q. Did he not send for you at your house?
A. He did not send for me.
Q. You met him accidentally?
A. Accidentally.
Q. You did not know he was to be there?
A. Did not know anything about it.
Q. You mean to say he did not come for you?
A. I mean to say he did not come for me. I met him on the boat.
Q. Where is your house?
A. I live in Lawton addition.
Q. Diden't Mr. Eldridge come up to that place?
A. He did not come for me.
Q. He came to that place?
A. Yes; he came there.
Q. He said he wanted you to come to Whatcom as a witness?
A. I said I would.
Q. Did he want to know whether you would come and testify in this case?
A. No; he did not say anything about it until we got on the boat.
Q. He just wanted you to come to Whatcom?
A. I came to Whatcom without him to bring me.
Q. Mr. Smith?
A. Well, what is it?
Q. You got this power of attorney, did you?
84 A. Yes, sir.
Q. What did you get it for?
A. I got it for that house.
Q. That is the reason you got it?
A. Yes, sir; that is the reason I got it.
Q. You wrote to Betsy Jones for it?
A. Yes, sir.
Q. How long before you got it?
A. Three months, I guess.
Q. It was sent to you?

A. Sent to Thomas Jones, rather, but I got it.
Q. Was notary public seal on it?
A. There was a seal on it.
Q. Notary public?
A. I can't say; I seen it, though.
Q. How do you know it was a seal?
A. I can tell one when I see it.
Q. You did not read power of attorney, did you?
A. No, sir; I got some one else to do the business.
Q. You did?
A. Yes.
Q. Can you tell a notary public seal when you see it?
A. Certainly I can.
Q. Then you don't know whether it was or was not?
A. I know it was a seal. I had some one else do the work for me
Q. What was the notary's name?
A. I could not say.
85 Q. Are you prepared to say it was a notary public seal?
A. I am prepared to swear that the notary, Mr. Barkhouser, said it was and said it was all right.
Q. You saw it yourself?
A. I saw it.
Q. You think it was?
A. Yes; certainly.
Q. First one was not right?
A. Was not right and we were not to pay the money. They said it was not wrote up right.
Q. It was not a deed you were getting, was it?
A. Not a deed; a power of attorney; but what is the difference if there is no mistake about these things?
Q. How did Betsy Jones sign her name?
A. She could not write; she made her mark.
Q. You remember that?
A. I remember that very well. I know she could not write, and Thomas Jones likewise.
Q. Was there a little seal after Betsy Jones' name?
A. There was a large seal on it. Whether it was after her name I don't know.
Q. Was there any seal after her name—a little one?
A. I could not tell, as I did not look at it particular enough to know that.
Q. Do you know whether there was any witnesses to it?
A. I do not know, but Mr. Barkhouser, my attorney, said——
Q. You did not know it was a power of attorney at all?
86 A. The power of her attorney to sell the place.
Q. Did you read it?
A. Of course I did not read it.
Q. All you know is what Mr. Barkhouser, your lawyer, told you?
A. Certainly. I saw it and saw the seal.

Q. Did you know there was a notary public seal there before they told you it was a power of attorney?

A. No, sir; he did not.

Q. What did he tell you?

A. He told me that was Betsy's power of attorney to himself.

Q. You did not see anything much yourself?

A. I did not read it, but I was satisfied.

Q. All you know was what your lawyer told you?

A. Certainly.

Q. You don't know anything about it, except about your lot there; that was all you were after?

A. That was my lot; the power of attorney was for Thomas to dispose of all his property and hers together—community property, both of them.

Q. Community property?

A. Yes; both of them.

Q. Who was your lawyer?

A. Doty.

Q. Seth Doty; is that the name?

A. I can't tell, except Doty.

Q. He was the man that had that Morrison claim, was he not?

87 A. I don't know what claim he had.

Q. What was he doing here?

A. He was living at one place and was keeping kind of house there at one time.

Q. Was he a justice of the peace?

A. I don't remember him being justice of the peace.

Q. Was he not working at the Morrison claim?

A. Not to my knowledge.

Q. Pretty smart kind of a fellow, was he not?

A. Old kind of fellow; same as me.

Q. Could he write?

A. Yes; pretty smart man.

Q. You thought he was a lawyer?

A. I am pretty confident he was a lawyer here at that time.

Q. Did he have an office?

A. No office at that time.

Q. What made you think he was a lawyer?

A. Reported to be so, and knew law anyhow.

Q. How old was he?

A. Forty or fifty years old, I should think. I was thirty years younger than I am now.

Q. It was Seth Doty?

A. I am not sure what his first name was.

Q. What year was that in?

A. Sixty-two.

Q. How many people were here then?

A. I could not say that. More at the mine than there were here.

Q. Do you know whether it was the same man that had

88 that Morrison claim or not?

A. I don't remember.
Q. You was up on the road in British Columbia after that?
A. Yes, sir.
Q. Who was she living with at that time?
A. Kearney.
Q. Where was she living at?
A. At 145-mile Post house, or near there.
Q. How far is that from Yale?
A. Could not say exactly now.
Q. You had a talk with her about your house?
A. Yes, sir.
Q. You wanted to know *of* power was good, did you not?
A. Yes, sir; Betsy was from same place as me.
Q. Where was that?
A. In England.
Q. Whereabouts in England?
A. Hanley.
Q. So she told you when you had the talk with her that the power was given to Thomas to sell this lot was all right?
A. Yes, sir.
Q. That is all the talk you had with her about that?
A. All the talk I had with her about that.
Q. Did she tell you what notary?
A. Not to my knowledge; not now.
Q. Did you not have any knowledge about that?
A. We did not think every one was a thief then, in those days.
89 Q. I believe you stated there was about an acre cleared.
A. I think there was about an acre fenced at the time.
Q. When you say below the house you mean toward the Bay?
A. I mean over that way (indicating).
Q. Which direction?
A. Just below the house.
Q. East or west or north or south?
A. It was more east.
Q. That was when Tom was there?
A. He was not there then. He was working in the mines.
Q. The next thing you knew some other people were there?
A. Yes, sir.
Q. How do you know they got there?
A. I saw them there.
Q. Lived there right straight along?
A. It was this way: If a man wanted to get a piece of land they went and lived there a little while, and pretty soon some one else would come.
Q. How long between times?
A. I could not tell that. Sometimes in a year or two. Some would come down and cut shingles for a living for the winter.
Q. How long a time that nobody lived there—six or eight months at a time?
A. I could not say.

Q. How do you know who told them they could go and live there?

A. The men would tell me themselves where they were living. They would come to know whether they wanted props or anything at the mine, and then I knew where they were living, for
90 they would tell me to come to Mrs. Jones' house.

Q. They told you that he said they could go there?

A. Certainly; no one thought of going there without permission.

Q. Then when you testified that people were living in this cabin, and that Captain Eldridge let them live there, the reason you say that was because the people told you so themselves?

A. Certainly; I could see it; I had to go there often to pick out the props.

Q. Did you ever hear Mr. Eldridge tell any one they could live there?

A. I could not; certainly I could not hear.

Q. All you know was what they told you?

A. Certainly. What could you know more?

Q. You spoke about them getting props. Where did you get props?

A. All over the place; all over the Fitzhugh claim and the Vail claim or anywhere they wanted to; yes, and even down in Eliza island.

Q. Wherever they wanted to go?

A. Yes, sir.

Q. Just go and cut where you wanted to?

A. Yes. You would have to ask permission except it was on the company's ground.

Q. You would have to ask on the company's ground. Nowhere else?

A. No; nowhere else.

Q. So when they wanted to cut props they would just go
91 and cut them, except on the company's ground?

A. Yes, sir.

Q. About the same way with shingles?

A. No, sir; not in all places. In some places there was.

Q. Did you ever cut any shingles?

A. No; I never did.

Q. Did the man get them wherever they could cut them handy?

A. Sometimes, most of the places.

Q. You never heard Captain Eldridge give permission to cut shingles?

A. Certainly I did not, but I know they cut shingles there.

Q. They cut on Captain Roeder's and Bartlett's?

A. Yes, sir.

Q. Who ever told you that Captain Eldridge had bought the Jones place?

A. Who ever told me?

Q. Yes.

A. Why, I know Captain Eldridge bought it. Jones was living with me there when he bought it.

Q. He told you?

A. Yes.

Q. Anybody else ever tell you?

A. The general talk over the place.

Q. Anybody else ever tell you?

A. I am sure that I heard all the people around in the place talking that Mr. Eldridge bought it, as well as Mr. Jones.

Q. What did Mr. Jones say, that he had sold Captain El-
92 dridge his place?

A. Yes, sir.

Q. Then you suppose Tom Jones sold Captain Eldridge his place?

A. I suppose.

Q. How many acres was it?

A. Supposed to have 160 acres.

Q. Supposed it was?

A. Yes, sir.

Q. You say you saw him there. Where did you see him?

A. On that claim I have seen him.

Q. What part of the claim?

A. Looking after his cattle and different things.

Q. Have they a place to pasture cattle?

A. Sometimes clear up to Lummi, like other people.

Q. How far back did you ever see the Captain from the cabin?

A. I have seen him on his claim.

Q. How far from the cabin?

A. Pretty close to it.

Q. Less than half a mile?

A. Less than a quarter of a mile.

Q. Less than half a mile back in the woods?

A. No. I did not go myself, because I did not go myself unless I was hunting.

Q. You never saw any cutting back in the raise?

A. I have seen plenty of them places.

Q. Right near around the road?

A. Around in places.

93 Q. I suppose when they got props and shingles they went where they could get them handiest?

A. Certainly.

Q. Handiest near the water?

A. Not at all times.

Q. Did they have to have a road?

A. They had a road.

Q. A place where they cut shingles and props was where that road was?

A. Sometimes; whenever it suited them.

Q. Where else did they cut?

A. Anywhere they could cut them.

Q. They cut in back there very far from the road?

A. Back in from the road.

Q. Hundred feet or two; something like that?
A. Yes; that far.
Q. How much farther were they back there; not over a hundred feet?
A. I am not sure; can't tell how much they did cut in there over a hundred feet.
Q. You spoke about Captain Eldridge owning that place. You spoke about people saying he owned it.
A. Yes, sir.
Q. Nothing said more than that; they would say he was living there?
A. I never knew he was living there myself.
Q. Nobody said anything more about his living there, any more than that he owned it?
94 A. The men that were cutting bolts would pay 25 cents a cord for them.
Q. Who told you that?
A. The men cutting them.
Q. That is all you know about it?
A. I know that the company told them likewise; that the company paid Mr. Eldridge. Mr. Eldridge got paid of what they took from the place. They bought the bolts.
Q. When you gave this power of attorney to Doty to look at——
A. When Tom Jones, you mean?
Q. Yes. Doty told you that that would make your lot all right?
A. Yes, sir.
Q. That is the reason you gave it to him, to see if your lot was all right?
A. I did not give it to him. Tom Jones did.
Q. So you could find out whether that covered your lot or not?
A. Yes, sir.
Q. He told you that that paper would give you right to sell that lot?
A. Yes, sir.

Redirect examination.

By Mr. THOMPSON:

Q. I understood you to say you come from the same place as Mrs. Jones?
A. Yes, sir.
Q. Do you know about her age?
A. I don't know her age?
Q. About how did her age compare with yours, as nearly as you could tell?
95 A. I should think she was about the same age as me.
Q. How old were you when you left that place that you and Mrs. Jones came from?
A. I left that place in 1844.
Q. How old were you then?
A. About 19 years old then.

Q. Did you ever hear Mrs. Jones or any other person speak of her having any sisters or brothers?

A. I never did.

Q. Did you ever know of her having any brothers or sisters?

A. No, sir.

—. Did you know her before you left that place?

A. I knew her people.

Q. You knew the Jones family?

A. Yes, sir.

Q. Did you know her father and mother?

A. I knew her father and mother, but not personally acquainted with them; but I knew of them.

Q. How far did you live from them?

A. About a short quarter of a mile. I lived in what they call Court——

—. And you know nothing about there being any brothers or sisters?

A. No, sir. I have brothers and sisters there, and could find it all out.

Recross-examination.

Examined by Mr. BLACK:

Q. What was Betsy's father's name?

96 A. Could not say now.

Q. What was his last name?

A. Black something. I think his name was Black something.

Q. Don't know her mother's name?

A. I do not.

Q. Do you know where they lived?

A. In Badley Hedge.

Q. Do you know when he died?

A. No, sir.

Q. Was he living then?

A. I could not say whether they were or not.

Q. You don't know their name?

A. I think his name was Black; I am not pos-tive, but I think it was something like that.

Q. You did not know much about the family, did you?

A. Could not know much.

Q. What did her father do?

A. Could not say now. I know they lived there.

Q. How did you know they lived there?

A. Same as any other boys living around there. I knew every one about the place.

Q. How big a place at that time?

A. A small place.

Q. Well, how big a place at that time?

A. Oh, fifteen or sixteen houses.

Q. How far from Edgewood?

A. Not far.

Q. Do you mean Shelton?
97 A. I don't remember.
Q. Do you know whether Betsy's father worked on the boats or not?
A. I don't believe he was at that time.
Q. What was he—a blacksmith?
A. I could not say.
Q. How do you know Betsy had no sisters or brothers?
A. I never heard her talk of any brothers or sisters.
Q. All you know is what Betsy told you?
A. Yes, sir; that is all—what Betsy told me.

Witness excused.
Adjourned until 10 o'clock Tuesday morning, 1, 19, '92.

Morning Session.

Mr. Thompson asks to have Mr. Eldridge recalled to the stand.

Mr. LEAMING: We desire to object to Mr. Eldridge being at this time recalled, having been twice called and examined and testified, covering the entire case, and then recalled. We object to opening the case up again.
COURT: What is your purpose for recalling witness?
Mr. THOMPSON: I wish to ask him if he is the same Mr. Smith who signed before Jones and Eldridge as witness.
COURT: I will permit that.

Q. Captain, state, if you know the fact, whether the Mr. Smith who testified as witness in this case is the same Mr. Smith whose name appears as witness on the deed of Jones to yourself.
A. He is the same man.

98 Plaintiff rests.

Mr. LEAMING: We desire at this time to make a motion to strike from the records all testimony that has been introduced on the part of the plaintiff for the purpose of proving or tending to prove in any way that there ever existed a power of attorney executed by Betsy Jones to her husband, Thomas Jones, or contents of any such instrument, for the following reasons:

1st. Because no lawful power of attorney from a wife to a husband could exist at the date of the alleged power of attorney, and the existence of the same is therefore irrelevant and immaterial.

2nd. Because plaintiff and its grantors, by reason of long delay in recording or establishing the existence or contents of any such power of attorney if any existed, cannot lawfully or equitably at this time claim the right to establish the same, and especially cannot as against the defendant in this case.

3rd. Because the contents of a written instrument cannot be proven by parol testimony after the lapse of so many years as have transpired since the execution of the alleged power of attorney in this action.

4th. Because the proofs offered in this case to establish the existence and contents of a power of attorney are insufficient for that purpose in law, in that (1) the contents of the alleged instrument has not been sufficiently proven; (2) the due execution of the
99 alleged instrument has not been sufficiently proven; (3) the genuine-ss of the alleged instrument has not been sufficiently proven; (4) no sufficient foundation has been established for the proofs offered.

We desire also to make a motion to strike all of the testimony that has been introduced on the part of the plaintiff for the purpose of proving adverse possession of the premises in question, for the following reasons:

1st. Because the proofs offered are incompetent, irrelevant, and immaterial under the issues of the case as framed.

2nd. Because title by adverse possession can in no case stand as foundation for a suit to quiet or remove a cloud from such title.

3rd. Because the lands in controversy are of such a character that title by adverse possession cannot be acquired thereto.

4th. Because adverse possession can in no case be pleaded except as defense.

5th. Because the proofs offered in this case are insufficient to establish title by adverse possession, in that no actual, open, notorious, hostile, and continuous possession of the premises in the suit ha*ve* been proven for the statutory period.

Further and specifically do we make the same motion as to testimony in relation to all the acts of possession or the exercise of all acts of ownership by plaintiff or its grantors as to the west half of the land described in the complaint, for the reason that such land is in no way in controversy, and title to the same is derived
100 from an independent grantor—a different grantor from that *to* which the title of the land in dispute is derived—and no acts of ownership or possession in relation to the one tract, the west tract, can in *no* way be admissable in evidence in the controversy respecting title to the other tract for the reason that no possession by reason of acts of ownership over one tract can extend beyond the boundary of that tract.

We desire to move to strike from the records Exhibits "B, C, D, E, F, G, H, I, J, K, L, M, N, and O." However, we desire to include all exhibits except Exhibit "A," upon the ground that all such exhibits are wholly dependent upon and only material in the event of the establishment of the power of attorney in controversy, and the failure to establish the power of attorney renders all such exhibits incompetent in the case.

And further motion to strike the exhibits as urged on the specific grounds that were stated at the time that the exhibits were offered, varying somewhat as to different exhibits, as I anticipate will not be necessary to repeat further than to refer to the objections made at the time the exhibits were offered.

We desire to also make more specific the third objection on motion to strike in relation to adverse possession, namely, objection to the land in controversy as not of the character to admit adverse

possession, the specific ground to that objection being that the land is a large tract, as given by evidence, of wholly unimproved, uncultivated, primitive, and wild timber land and in no sense agricultural in its character, and no act of possession or
101 ownership or control or occupancy of a portion of such a tract can, under the rule established by the courts, extend a constructive possession of any part of such a tract not actually occupied, and no proof in the case has been offered to establish any actual occupancy or any possession of any specific part of the entire tract.

Further, no definite proof—no proof, rather—has been offered or introduced showing any act of ownership or possession of any part of that tract—the tract to which I refer being the Betsy Jones donation—the east half of the Jones donation claim and land in controversy in this case.

COURT: Your various motions to strike undoubtedly include all the objections you have made in the course of the trial, and I have not passed on these objections, all of them. I think, in view of that, that the stenographer had better leave after each objection a space, when the transcript is prepared, so I can insert my rulings on the various objections, and will give exceptions in all cases where objections have been made.

Motion denied. Exception allowed.

Mr. TAWES, witness, being produced, duly sworn, and examined, testified as follows:

Examined by Mr. BLACK:

Q. What is your full name?
A. McHugh P. Tawes.
Q. Where do you reside?
A. At present at Ferndale, a mile beyond.
Q. Whatcom county?
A. Yes, sir.
102 Q. How far is that from this city?
A. About ten miles.
Q. What is your occupation?
A. Farmer, at present.
Q. When did you first come to this locality, Bellingham Bay?
A. In the spring of 1857.
Q. What was your occupation at that time?
A. I came here as a mechanic—engineer.
Q. How long did you remain here, and in what employment?
A. I remained here as engineer of the Bellingham Bay Coal Mine Company for about four years, I think, first, and then I was following other pursuits for a few years.
Q. Ever leave here?
A. Yes, sir.
Q. Where did you go from here?
A. To British Columbia.
Q. What part?

A. Well, I was up in the Caraboo country, and I lived about five miles above Fort Yale for nearly two years.

Q. When was that, Mr. Tawes?

A. I went to British Columbia in '63, I think.

Q. When did you return?

A. I returned here again in the fall of the same year; my family was living here.

Q. You went back to B. C. after that?

A. Yes, sir.

Q. When?

A. Went back in 1864.

103 Q. How long did you remain that time?

A. Until the winter of 1865.

Q. Where did you go then?

A. Came back to Bellingham Bay.

Q. Where have you been since that time?

A. Here in this county.

Q. From that time up to 1870 where were you living?

A. I was living here in Sehome.

Q. By Sehome, do you mean at the point near the old coal mine?

A. Yes, sir.

Q. Did you ever know Tom Jones?

A. Yes, sir.

Q. Betsy Jones?

A. Yes, sir.

Q. You may state whether or not you were well acquainted with them.

A. I was acquainted with them.

Q. Do you know, approximately, the location of the donation land claim taken up by Tom and Betsy Jones from the Government?

A. Yes; I know the location of the claim always known as the Jones claim.

Q. Ever been over it?

A. Yes, sir.

Q. What was the character of that claim in 1862, so far as it being improved was concerned?

A. Very little improvement on it.

Q. Was there any cabin thereabouts?

A. Yes, sir.

104 Q. State, as fully as you can, about the size and character of that cabin and the improvements about it.

A. Well, the cabin was a good-size cabin; I don't know really; twenty feet one way and fourteen or sixteen the other, as near as I can come to it.

Q. Any land cleared up about it?

A. I could not say that there was; might be a little spot around it that would be called a yard or something of that kind, but did not seem to be any clearing or what I would consider a clearing about it.

Q. Was it fenced in?
A. Some rails were there, but not fenced in.
Q. What time was that, about?
A. I was there frequently from 1858 up to 1863.
Q. Any after that?
A. Not until about 1866.
Q. From then how long?
A. From then until up about 1870.
Q. Did I understand you to say there was no fence there during any of that time?
A. There were fence rails, but I did not see any fence.
Q. Anybody living in that cabin at that time?
A. There might have been, but I never saw any one.
Q. How often were you there, do you suppose?
A. I could not say.
Q. Frequently?
A. Well, yes.
Q. Any evidence of inhabitation at that cabin at that time?
105 A. I did not see any evidences of it being inhabited.
Q. Any windows in it?
A. I certainly don't remember.
Q. Any doors?
A. I don't remember whether any doors were there or not; there was a place for a door. I can't say whether there was a door.
Q. What state of repair was that cabin in?
A. Apparently in pretty good repair when I first saw it there.
Q. Along between '66 and '70 what repair was it in?
A. Delapidated.
Q. Was it inhabitable at that time?
A. No, sir; I would not consider it so.
Q. How much was this plat of ground or clearing around the cabin, as near as you could estimate?
A. Well, I don't think there was a piece that was cleared—that I would actually call cleared up—larger than this house floor.
Q. Which side of that cabin was that clearing on?
A. I suppose it was on the east or southeast, probably; no, I think it was more on the east than anywhere.
Q. During the time you have spoken of was there any crops raised in that yard?
A. No, sir.
Q. Never was?
A. No, sir.
Q. Were you here in the court-room yesterday?
A. Yes, sir.
Q. Did you hear the testimony of Captain Eldridge on the stand to the effect that certain props were used in the coal mines here?
106 A. Yes, sir.
Q. Do you know what those props were and what was the character of them?
A. Yes, sir.

Q. Do you know from where they were obtained?

A. I know where some were obtained; I could not say where they all came from.

Q. Where were they obtained, as far as you know?

A. All along the side here, and a great many were brought from Lummi island.

Q. Do you know from what land they came?

A. No; I do not.

Q. Were they of any great value?

A. I don't really know; I don't think they were of any great value on the land.

Q. Do you know whether the character of the timber from which they were taken was abundent?

A. Was in some places.

Q. Do you know whether any of that character existed on the coal claim adjacent to the mine itself?

A. Yes; I think so.

Q. Do you know whether these props in any quantity were brought by water?

A. They were.

Q. Do you know whether that was the usual and easiest method to obtain them?

A. I think that was the easiest way to get them.

Q. Do you know whether or not there was any road from the coal mine up to and through the Jones donation claim?

107 A. There was a road up to it.

Q. Any through or in it?

A. No; don't think there was.

Q. You have been over the land frequently?

A. Yes, sir.

Q. Do you know whether or not there was any evidence of cutting of timber on the Jones donation claim?

A. I never knew of any.

Q. Did you ever see any on it?

A. Any timber cut on it?

Q. Yes.

A. No.

Q. How often have you been over and through the Jones donation claim—that is, from '62 to '70?

A. I should think I have been over—crossed over from the front to the back part of it ten or twelve times.

Q. What was the character of the growth, thick or otherwise?

A. There was considerable underbrush.

Q. You may state whether a man could, in your judgment, carry heavy timbers through that claim.

A. Could not carry them far.

Q. You may state whether it would be practicable to carry such timbers as were usually used as props from the back half of the Jones donation claim to the mine in the condition that the timber then was.

A. No, sir; it would not be.

Q. I understood you to say, Mr. Tawes, that the timber from which these props were cut as it stood was of but little value;
108 was I correct?

A. Yes, sir.

Q. You may state whether or not, if you know, if any objection was raised to the cutting of such timbers by the various owners of property in this neighborhood at that time.

A. I never heard of any.

Q. Do you know whether, as a matter of fact, such timber was cut on the various donation claims? I refer to the Morrison claim, the Vail claim, or any of such claims.

A. I know that they were cut on the Vail claim, but on the others I do not know whether they were or not.

Q. The claim I spoke of as the Fitzhugh claim was the claim owned by the company, was it not?

A. Yes, sir.

Q. Do you know whether any were ever cut on that or not?

A. Yes, sir.

Q. Do you know anything about the cutting of shingles during that period, from '62 to '69?

A. I do not.

Q. Do you know whether or not any shingles to any amount were cut on this bay at that time?

A. I do not; I know some small lots were.

Q. Cut for shipment or private use?

A. There was some shipped by the coal company's ships, I believe.

Q. What was the custom as to cedar at that time; was it of sufficient value that it was paid for by men cutting; do you know?

A. I don't know whether they were paid for it or not.

109 Q. What was the value of cedar standing or cut down at that time; was it of great or little value?

A. I don't really know—I don't really know whether it was considered worth anything or not. A great deal of it was burned up, and most of the cedar in this country had been killed by fire and was down on the ground.

Q. You don't know of any value having been attached to it, then?

A. No, sir; I don't know.

Q. I believe you stated, Mr. Tawes, that you lived in B. C., near Yale?

A. Yes, sir.

Q. While there did you know Betsy Jones?

A. Yes, sir.

Q. Do you know where she lived at that time?

A. Yes, sir.

Q. Where?

A. Upon the road to Caribau, near the lake. I think 145-mile Post; 145 miles from the railroad.

Q. Do you know with whom she was living at that time?

A. I don't know.

Q. Was she living with anybody?
A. Yes; she was not living alone.
Q. Was the person she was living with a man or a woman?
A. A man.
Q. You don't remember his name?
A. I have heard his name. I was not aquainted with him.
Q. Do you know on what terms Thomas and Betsy Jones were at that time, good or bad?
110 A. I can't say.
Q. Ever hear any conversation that would indicate whether they were on good or bad terms?
A. I never heard him say a word about her.
Q. Did you ever hear her say anything?
—. I never heard her say anything I remember of but once.
Q. What was that?

Mr. THOMSON: I want to interpose an objection that it is incompetent and immaterial.
COURT: I will allow the question.

A. She was at my house in British Columbia and said she thought possible she would have to come over to the Bay; that she had business that would require her here, but she would not come while Jones was living here.
Q. Did she say what business she had?

Mr. KERR: Same objection.
COURT: Objection overruled. Exception allowed.

A. She said she wanted to come here to sell her land.
Q. What land did she say she wanted to sell?

KERR: Same objection.
COURT: Objection overruled. Exception allowed.

Q. State the whole conversation.

Mr. THOMPSON: The same objection.
COURT: Objection overruled. Exception allowed.

A. She said she wanted to come here and sell her claim.
Q. Do you know what claim she referred to?

Mr. KERR: The same objection.

A. I do not.
111 Q. When was this, Mr. Tawes?
A. In October, 1865.
Q. You may state whether anything was said at that time relative to your purchasing the land.

Mr. THOMPSON: Objected to as leading.
COURT: I will sustain the objection.

Q. Mr. Tawes, state fully, as near as you can recollect, all that was said at that conversation.

Mr. THOMPSON: That is objected to as incompetent and immaterial.

A. I don't know anything that was important that was said at that conversation.

Q. How far, Mr. Tawes, was the point at which Betsy Jones lived from Yale?

A. It was something over two hundred miles.

Q. How far was it from Victoria?

A. Over one hundred miles further.

Q. Do you know what the expense was going from the point where Betsy Jones lived to Yale prior to 1862?

A. Well, I don't really. They charged fifty dollars on the stage from Yale to Caribau.

Q. Would it be less or more than that?

A. If she traveled alone, but she had a boy with her; it would not cost her exceeding fifty dollars to travel from her place at Yale, either way. It would cost about that.

Q. Would that include provisions?

A. Not the way she was traveling; she could not get along for that; it would cost more.

112 Q. What would it cost from Victoria, if you know?

A. It would cost five dollars from Yale to Westminster and five dollars from there, I believe, and ten dollars each way.

Q. Would that have been all the expense?

A. That would have been merely the expense or fare on steamer.

Q. What other traveling expenses would there have been?

A. I don't know.

Q. What would have been the expenses from where she was living to Westminister?

A. I suppose it would have been sixty dollars; somewhere thereabouts; maybe seventy dollars.

Q. Did I understand that to be each way?

A. No, sir; it would cost over one hundred dollars the way she was traveling from where she lived to Westminister and back.

Q. You are familiar with that country up there?

A. Yes, sir.

Q. Do you know whether or not at Yale or any point between that and New Westminister at that time there were stationed any United States officer?

Mr. THOMPSON: We object to that as immaterial.

COURT: Objection overruled. Exception allowed.

Q. Do you know whether there was any United States minister there, or consul?

A. I did't know of any.

Mr. KERR: Same objection; it is immaterial.

COURT: Objection overruled. Exception allowed.

113 A. There was none.

Q. Do you know whether there was any town or city that had a mayor between Yale and New Westminister?

Mr. KERR: Same objection.
COURT: Objection overruled. Exception allowed.

A. I do not.
Q. Did you say there was none or that you did not know?
A. There was none.
Q. Do you know whether or not there was any justice of the peace or judge at Yale?

Mr. KERR: Same objection.
COURT: Objection overruled. Exception allowed.

A. There was.
Q. What was he?
A. A justice of the peace.
Q. Do you know whether any notary public was there or not?
A. I do not.
Q. Did I understand you to say there was no United States consul there?
A. There was none.
Q. Where was the nearest United States consul to the 145-mile Post house at that time?

Mr. KERR: Same objection.
COURT: Objection overruled. Exception allowed.

A. Victoria.
Q. Where did the nearest mayor live at that time?

Mr. KERR: Same objection.
COURT: Objection overruled. Exception allowed.

114 A. At Victoria, I think; nearest that I know of.
Q. Do you know Captain Eldridge?
A. Yes.
Q. You may state if you know whether Captain Eldridge from 1862 to 1870 lived upon the Jones donation claim or any part of it.
A. Not that I know of.
Q. You may state whether or not he did any acts of any kind on that claim between those dates.
A. Not that I know of; I never saw him there.
Q. What official position, if any, did you occupy in this county?
A. I don't occupy any at present.
Q. At or about 1869?
A. I don't know that I occupied any; yes, I was justice of the peace.
Q. Do you know when Thomas Jones died?
A. I suppose he died in Sehome.
Q. Did you have any connection with his burial?
A. Yes, sir.
Q. In any official capacity?

Mr. KERR: We object to that, as it is immaterial.

A. I would state in what capacity I was there. I was living within about one hundred yards or less from the house where he

died. Some parties came down and told me he was dead and that he was living with people in that house that were suspicious and who they could not put confidences in, and he had died
115 very sudden that night, and that an inquest should be held, and in the absence of the coroner it would be me to do it. I went there and examined the body and surrounding circumstances, and I and two friends that were with me concluded that it was unnecessary for an inquest, although we knew that a burial was necessary, and we went to work and made preparations to bury him. I got lumber and had a coffin made, and myself and old Captain Utter was at the expense of burying him.

Q. At that time who did you expect owned the claim?

Mr. KERR: We object to that as immaterial.

COURT: I will permit the same question put to him as put to the other witnesses.

Q. How many people were there living here from 1865 until 1870 on this bay, as near as you can remember?

A. There were probably two hundred.

Q. Did you know the general reputation among the community as to the ownership of the donation claims about here and by what they were called?

A. Of that claim?

Q. All the donation claims around here.

A. They were called donation claims.

Q. You know what they were generally called?

A. Yes, sir.

Q. What was that claim?

A. The Jones claim.

Q. At that time by whom was it reputed to be owned?

116 Mr. KERR: We object to that as incompetent and immaterial; witness has not shown that he knows the reputation.

COURT: I will permit him to answer the question if he knows the general repute of the neighborhood.

A. As far as I know or as far as I had heard up to the date of Jones' death, that was called the Jones claim, and I supposed it was.

Mr. KERR: I move to strike out the answer as immaterial.

COURT: I will have it stricken out, except so far as the general reputation in the community goes. If he knows the general reputation he may answer.

Q. I understood you to say that you knew what the general reputation in the community was as to the ownership, did I?

A. I can't say the general reputation, as I had never heard the general reputation about it; I don't know what the general reputation was.

Q. Ever hear it spoken of in the community at all?

A. Not more than it was his claim: I never heard anything more about it.

Q. Did you ever hear it spoken of as the Jones claim?

A. Yes.

Q. Frequently?

A. Yes.

Q. Did you ever hear it spoken of as owned by Captain Eldridge?

A. The day Jones was buried I did.

Q. Prior to that time, I mean?

A. No, sir.

117 Q. Mr. Tawes, in speaking of the conversation you had with Betsy Jones in 1865, you may tell me whether there was anything said at that time relative to advise given Betsy Jones by the justice of the peace in Yale or some officer in Yale.

Mr. KERR: We object as immaterial and leading.

Q. You may state fully what that conversation was.

Mr. KERR: We object now for the reason that the witness has detailed that conversation and it is immaterial and incompetent.

COURT: I will permit the question.

A. I don't want to tell anything that was unnecessary, because there was a great deal of conversation there that I don't consider had anything to do with this case and things I don't propose to tell to any one. As I stated, she wanted to sell her land here, and I told her myself to go down and see the justice of the peace at Yale. I could not advise her what to do. She said she went down there and asked Mr. Saunders, the justice of the peace there, what she would do to sell the land without coming here herself. He told her she could have the power of attorney made out and for her to go down to Victoria and have it signed by regular consul and that would do. She said she could not afford the expense of going there and back. She came back to my house and stopped that night and went the next day. Not long after I heard she was dead.

Mr. KERR: We want to strike out the answer as incompetent and immaterial.

COURT: As far as the conversation of the justice of the peace, I will have to strike that out. Exception allowed.

Q. What was the date of that conversation?

118 A. That was in 1865.

Cross-examination.

Mr. THOMPSON:

Q. Was that the first time you had seen Betsy Jones after she went away from the Bay here?

A. No, sir.

Q. When had you seen her after she left the Bay, before this conversation in 1865?

A. In 1863.

Q. Where was she then?

A. 145-mile Post.

Q. Did you see her at any time between the time she left the Bay and 1863?

A. No, sir.

Q. What time did she go away from the Bay?

A. Either in 1859 or 1860.

Q. Do you know from your own knowledge where she went to from the Bay here?

A. No, sir.

Q. Do you know whether she went to Port Townsend or not?

A. I heard she did, but I don't know anything about it.

Q. Do you know whether she stopped at Port Townsend before going to Yale?

A. I do not.

Q. You did not hear about that?

A. I did not hear where she was. I understood in British Columbia, but where I diedn't know.

119 Q. You don't know whether she was living in the 145-mile Post house in 1862 when this power of attorney is said to have been signed or not?

A. I do not.

Q. Do you know whether the man that was living at her house or living with her was a commissioned officer of the United States at any time?

A. I do not; I don't know the man.

Q. You don't know that the party that was living there was an officer authorized under the law to take acknowledgements, do you?

A. I don't.

Q. You say the first time you heard the ownership of the Jones claim discussed was at the time of his death, and then you heard that Captain Eldridge was the owner?

A. Yes, sir.

Q. So the first time you ever heard that matter mentioned in the community you were informed that Captain Eldridge owned the claim, and you understood that he owned it from that time on?

A. Yes, sir.

Q. In what were you engaged that made it necessary or convenient for you to go over this Jones claim at these times?

A. I was engineer at the mines, and on Sunday I had nothing else to do and I went out there to hunt deer.

Q. You were out there on pleasure and not on business?

A. Yes, sir.

120 Q. Did you during these excursions make any special examination of the claim for the purpose of ascertaining what had been done there?

A. No, sir; I did not.

Q. It is quite possible, is it not, that considerable quantities of timber might have been taken from there, from either the east half or the west half of the claim, for shingle bolts or props without

your knowing it or particularly remembering it at the present time, is it not?

A. I remember very distinctly that there was no road; I had to go across logs.

Q. Is that the only reason that makes you think there were no shingle bolts or props taken from the claim—because there was no road?

A. I did not say none had been taken from there; I never seen any taken from there or seen from where there was any taken.

Q. All you can say about the matter is that if any shingle bolts or props were taken from there that you did not know about it? That is it, is it not?

A. Yes; I don't know about it.

Q. What has been your relations and feelings with Captain Eldridge for a good many years; friendly or otherwise?

A. We have been friendly; no other feeling that I know of at present; never had any trouble any more than sometimes opposite to each other in politics; nothing more than that.

Q. Did Jones have a garden at his house?

A. I did not see any garden.

Q. Can you say whether he did have one or not?

121 A. Not to my knowledge.

Q. Do you know whether he did or did not; are you prepared to say he did not have?

A. I am prepared to say that I never saw any of any ground that looked like he had any crop raised on it.

Q. What kind of road extended from the Bay to the house?

A. In the early days there was a trail; later than that they had a road cut up there by the company, getting timbers out.

Q. When was that road cut up there to get timbers out?

A. I don't know exactly when it was; probably done in 1864 or '65.

Q. Then from 1864-'5 and during the operation of the coal mines timbers and props were taken from the claim?

A. They were taken from the company's claim.

Q. Were none taken from the Jones claim?

A. Not that I know of.

Q. When, if you know, was the first clearing or cultivation or work done on that claim after 1862?

A. I never knew of anything being done.

Q. Do you know of anything done now or not?

A. I have not been there since 1870.

Q. How many times have you been there on that claim since 1870?

A. I have not been there at all since 1870.

Q. Then you don't know anything about what Captain Eldridge may have done on the claim since 1870?

A. No, sir.

Q. You don't know who has been in possession of the claim or any one since that time?

122 A. No, sir; I do not.

Witness excused.

Mr. EVANS, witness, being produced, duly sworn, and examined, testified as follows:

Examined by Mr. BLACK:

Q. State your full name, Mr. Evans.
A. John Evans.
Q. Where do you reside?
A. At Ferndale.
Q. When did you first come to this Bay?
A. I came here in 1866.
Q. What was your occupation?
A. Miner.
Q. Where did you settle and what did you do when you came here?
A. I went to work in the mines.
Q. The coal mines over in Sehome?
A. Yes, sir.
Q. How long were you there?
A. From 1866 until 1878 or '79. I did not work in the mines all this time. I was at Whatcom lake part of the time.
Q. How much of the time were you out at Lake Whatcom?
A. Eighteen months, I suppose.
Q. Balance of the time you lived on the bay here?
A. Yes, sir.
123 Q. Ever over in British Columbia?
A. I have.
Q. When were you there?
A. Went up there in 1862 and came back in 1866. I would come down in the winters and go up in the spring of the year.
Q. Whereabouts in British Columbia were you?
A. Williams Creek, in Caribau.
Q. You were in the court-room yesterday and today?
A. Yes, sir.
Q. You have heard testimony given to the effect that Betsy Jones lived at 145-mile Post house, in British Columbia?
A. Yes, sir.
Q. How far from where you were living?
A. Further north from here.
Q. Do you know Betsy Jones?
A. I stopped there a few times; sometimes stopped to get a meal.
Q. Where was she living when you stopped?
A. She was at this side of Williams lake.
Q. Who was she living with? Do you know?
A. They called him Kearney.
Q. Was she living with her husband at that time, Thomas Jones?
A. No, sir.
Q. Do you know on what terms she and her husband were at that time?
A. I never heard.
Q. Was it a town where she was living?
124 A. No; just a little house.

Q. Where was the nearest town, Mr. Evans?

A. I guess about Yale was the nearest, to my knowledge.

Q. How far off was that?

A. Two hundred miles, I think.

Q. Do you know whether there was a mayor at Yale at that time?

A. I don't know. When I traveled I almost always go right through.

Q. When did you first know Betsy Jones there at that place?

A. I think it was in 1863.

Q. The first time in 1863?

A. Yes, sir.

Q. Where was the next nearest town to that place after Yale?

A. Well, I guess Westminister.

Q. How far off was that?

A. Well, I don't know. I am not sure how far it was from Port Yale; sixty miles, I think; something like that. I generally went on the steamboat, and I don't remember the distance.

Q. Sixty miles from where?

A. From Port Yale to Westminister.

Q. Sixty miles in addition to what it was from Fort Yale?

A. Yes, sir.

Q. Do you know what the expense was of going from this point you say Betsy Jones was residing on or prior to 1862, from Port Yale to Westminister?

Mr. THOMPSON: We object, as it is incompetent and immaterial.

COURT: I will permit the question and give exception.

A. Well, no; I don't know, for a fact. I know from
125 Williams Creek it was 125 dollars down to Fort Yale.

Q. How far was Williams Creek from where Betsy Jones lived?

A. About two hundred and twenty miles, perhaps.

Q. Do you know this tract of land in dispute in this action called the Jones donation claim?

A. I have been on part of it.

Q. When?

A. Well, from 1866 to 1870; perhaps I have been over it half a dozen times.

Q. Do you know where the cabin was that has been referred to?

A. Yes; I have been there two or three times.

Q. What was the character of improvements and the size of the clearing, if any? And if there was any fence state all you know about it.

A. The cabin was a decent cabin, built of logs. I don't remember the fence or clearing about it. It was slashed, but I saw land that seemed to be growing second growth. There was an opening there.

Q. How large an opening was there?

A. A quarter of an acre or perhaps more.

Q. Was that quarter of an acre cleared—stumps all out and everything?

A. No, sir.

Q. Anybody living there from 1866 to 1878?

A. Not to my knowledge.

Q. You were up there?

A. Yes, sir.

Q. How many times were you there?

126 A. Two or three times or four times; perhaps more.

Q. What kind of repair was cabin in; was it inhabitable?

A. I don't remember much about the cabin, more than it was a log cabin. There was no window—I don't think there was any window. The door was off.

Q. Any fence or anybody living there when you were there?

A. No, sir.

Q. No fence or ground being cultivated during any of that time?

A. I could not tell; possibly the ground may have been, but it was still kind of growing up. A few years make quite a difference in this country; diden't look to me like anything of account there.

Q. Do you know the character of the timber on the Jones claim; was it thick or otherwise?

A. Yes; pretty thick all through.

Q. Any roads through there?

A. Kind of trails; some down timber on it. Several trees had fallen over that trail at times.

Q. Where did this trail go?

A. Past the cabin.

Q. Which way did it come from?

A. Behind Sehome.

Q. Was there any trail back of this cabin?

A. I did not see any trail further than the cabin.

Q. Were there ever any through the claim back of there?

A. I did not know the lines between the company's land and the Jones claim.

127 Q. You say the company's land this side of the Jones claim, west of the Jones claim; was that heavily timbered or not?

A. Yes; pretty heavy timber; a good deal had been split and used.

Q. Any road from the Jones claim through that?

A. Part of a road.

Q. Up to the cabin?

A. Yes.

Q. State if you know whether there was any other road than the road to the cabin.

A. I don't know of any other road; I don't remember.

Q. You stated you worked in the mines?

A. Yes, sir.

Q. Know what props are, such as were used in the mines?

A. Yes, sir; I *sued* as many as anybody else.

Q. Used props in the mine, did you?
A. Yes, sir.
Q. Know where they came from?
A. In my time, 1866, the most of the timber came from Lummi island, across the bay here; that was in 1866.
Q. 1866 to 1870?
A. Yes, sir.
Q. Most of the timber came from Lummi island?
A. Yes, sir; by water and rafts, and I don't know but some came from above; don't know whether it came from the Jones land or the company's land.
Q. Who owned that coal mine, the company?
A. Yes, sir.
128 Q. Which would have been most convenient if the mines had wanted props, to get them from the Jones claim or from the company's claim?

Mr. KERR: We object to that as incompetent.
COURT: I will sustain the objection and give exception.

Q. Do you know whether there was any timber on the company's land of the correct size to make props of?
A. Some of them were too large for that purpose, and they generally have round props, from one foot through for props.
Q. How were the props brought there when they cut them on the land, by teams or carried?
A. They generaliy hauled them since I been here on little rafts on the bay. I don't remember of any props coming from the mine land here; they supplied what they called lagging back there; I don't know whether it came from the Jones land or company's land; they split a good deal on the company's land.
Q. You don't know whether they split any on the Jones land or not?
A. I could not tell.

Cross-examination.

Mr. THOMPSON:

Q. I understood you to say you first knew Betsy Jones at 145-mile Post house in 1863; was that correct?
A. Yes.
Q. I also understood you to say you went to Caribau in 1862?
A. Yes.
129 Q. This 145-mile Post house was on the road you traveled in going there?
A. Yes.
Q. Did you stop at that house in 1862 when you were going there?
A. I don't know whether the house was built in 1862. I don't remember any house being there in 1862, but there was in 1863.
Q. Was it when you were going or coming back?
A. When I went.

Q. Was the house there at that time?

A. Yes, sir.

Q. You don't know whether the man who was there at that house was an officer of the United States or not, do you?

A. No; I don't know.

Q. You don't know whether he was an officer under the British Columbia government, do you?

A. I don't know anything about that.

Q. Were there many people around about there?

A. I did not see anybody except people traveling up to the mines.

Q. It was a way station there and people stopped off for accom-o-dation?

A. Yes, sir.

Q. You worked in the mines here from 1866 to 1878, did you?

A. Yes, sir.

Q. Did you ever pay any particular attention to the matter of where the cedar came from that was used in the mines for props?

130 A. No; I did not.

Q. You were mining and it was not part of your business as a miner to furnish the props, was it?

A. Oh, no; we used to get our timber from around.

Q. They were cut by other people?

A. Yes, sir.

Q. It was customary in those days to go out and get the cedar of the size and kind wanted wherever you could, was it not?

A. I am sure I could not tell you about that. I don't know where this cedar came from.

Q. You don't know where it came from?

A. No, sir.

Q. You don't know whether it came from the Jones claim or not?

A. No, sir; I do not.

Q. Do you know who was in possession of the Jones claim after 1878?

A. I don't know. I had heard Eldridge had bought of Thomas Jones years ago.

Q. It has always been spoken of as the Jones claim, has it not?

A. Yes.

Q. The customary way of speaking of the claims was to call them by the name of the man who located them, was it not?

A. Yes, sir.

Q. You heard when you were working in the mines that Eldridge was the owner?

A. I don't know how long since I heard. I heard a good many years ago and I can't recall.

Q. It was generally understood that the claim belonged after that time to Mr. Eldridge, was it not?

131 A. I heard so. I am sure I cannot tell.

Q. You were over on the Jones claim three or four times between 1866 and 1878?
A. Yes, sir.
Q. And never was on the claim after 1878?
A. No, sir.
Q. Were the two or three times you were over, between the years 1866 and 1878, right along within a short space of time?
A. I am sure I could not tell. In the course of the whole five years I might have went up three or four times. I would take a walk occasionally.
Q. You never made any special trip of the Jones claim with reference to charging your memory with the condition of the claim?
A. Oh, no; never anything of the kind.

Redirect examination.

Mr. BLACK:

Q. You say you don't remember the house was there in 1862 or not?
A. No; I don't remember whether it was there or not. I did not call there until 1863. That was the first time I ever was acquainted with Mrs. Jones.
Q. Did you stop at every road-house when you went along the road?
A. I did not stop over night. We use- to pack most of our grub most of the time, but sometimes we would have a meal here and there.
Q. It so happened that you did not stop at that place at that time?
132 A. No, sir; I did not stop at that place at that time.

Witness excused.
Adjourned until two o'clock.

Mr. GREEN, witness, being produced, duly sworn, and examined, testified as follows:

Examined by Mr. BLACK:

Q. What is your full name?
A. Edwin Green.
Q. Where do you reside?
A. At Ferndale.
Q. What is your occupation, Mr. Green?
A. I am a farmer at the present time.
Q. When did you first come to this point, Bellingham Bay?
A. In 1869.
Q. What was your occupation at that time?
A. Working in the coal mines.
Q. The coal mines referred to?
A. Yes, sir.

Q. Do you know the piece of land in dispute in this action known as the Jones claim?

A. Yes, sir.

Q. Ever been over it?

A. Yes, sir.

Q. When?

133 A. Over it in 1870 and 1872 or 1873 several times; cannot tell exactly.

Q. What was the character of the land? By what was it covered?

A. I don't understand.

Q. Timbered, was it?

A. Yes, sir.

Q. Any clearing?

A. Yes; a small clearing around the cabin.

Q. How much timber was there around the cabin?

A. Not a very large one. How much, I could not say.

Q. In your judgment, about what was the size and how much land did it cover?

A. Not a great deal. I could not say exactly.

Q. Was it a quarter of an acre?

A. I don't think more than a quarter of an acre.

Q. Was that clearing fenced in?

A. It was not at that time; just some rails laid around.

Q. Anybody living there?

A. No, sir.

Q. Anybody living there at any of the times you went there?

A. No, sir.

Q. Was the cabin in any shape for any one to live in?

A. Not a very fit condition for anybody to live in.

Q. Anybody ever cut timber on that claim?

A. Not to my knowledge.

Q. You say you were there at several times?

A. Yes, sir.

Q. Ever see any evidences of timber or wood being cut on it?

134 A. No more than around the cabin.

Q. Any roads through there?

A. There was a road went—pretty large road went—by it, and that went up the right of the cabin.

Q. Where was this road? Where did it run from?

A. Went from the mines here.

Q. Up which way?

A. That way (indicating).

Q. Over toward the Morrison claim?

A. Over towards the cabin; before you turn up the hill to go to the cabin.

Q. Was this road southwest of the cabin?

A. On the south, I should judge. No; southeast, to the best of——

Q. Which way from the coal mine was the road?

A. Southeast of the coal mine the road was.
Q. Do you know where Fairhaven now is?
A. Yes, sir.
Q. Which way from the coal mines as regards Fairhaven?
A. This way from Fairhaven. The road went over to Fairhaven when you went along the trail.
Q. Did you ever know anybody to cut timber on that claim?
A. No, sir.
Q. Ever know anybody to cut shingles or props for the mine?
A. No, sir; I did not.
Q. Do you know where they got the props for the mine?
A. Some from Lummi island; some from the company's land, and some from Fidalgo.
Q. Were there many props used along in that time?
135 A. Yes, sir; considerable props.
Q. Do you know whether the timber was of any value from which they made these props?
A. I only know what the mine gave.
Q. Do you know what they were worth?
A. Thirty or forty cents apiece at the mine.

Cross-examination.

By Mr. THOMPSON:

Q. Did this road you speak of run across the Jones claim?
A. A little east of it, of the cabin.
Q. It run east of the cabin. Did it run on the land?
A. I could not exactly tell where the line of the land run.
Q. You don't know exactly where the line of the land run?
A. No; I did not.
Q. Do you know whether there was timber cut off that claim?
A. I could not see any except what was around the cabin.
Q. Do you know whether there was any cut off or not?
A. That I can't tell.
Q. How many times were you on the land claim; how often did you go there?
A. I might say a dozen times.
Q. What did you go for?
A. Sometimes I would go hunting up there. Sometimes I did not know where to put the time and I went to pass the time away.
Q. It was to go and walk to enable you to pass away the time?
A. Yes, sir.
Q. You went for pleasure?
136 A. Just when I felt like it.
Q. Did you ever go up there with the purpose of inspecting the land?
A. No, sir.
Q. You never gave that matter any particular attention until your attention was called at this trial?
—. —.
Q. In what years were you upon the land?

A. In 1869, when I came here, and I left in 1878. I was over it several times.

Q. From 1869 to 1878 you lived here on the bay?

A. Yes, sir.

Q. Do you know who was in possession of that claim from 1878 on after you went away from here?

A. After I left?

Q. Yes.

A. Mr. Eldridge was in possession of it.

Q. It was generally understood during all that time you were here that Mr. Eldridge was in possession?

A. They called it Tom Jones' cabin, but Mr. Eldridge owned it.

Redirect examination:

Mr. BLACK: They said Mr. Eldridge was in possession of that. He owned it?

A. They said he had possession of it.

Q. Did you ever see any acts done there by him?

A. No, sir; I did not.

Q. Ever see him there?

A. No, sir.

137 Q. Ever hear of his being there?

A. I could not say I did.

Witness excused.

Mr. JOHN PLASTER, the witness, being produced, duly sworn, and examined, testified as follows:

Examined by Mr. BLACK:

Q. What is your full name?

A. John H. Plasters.

Q. Where do you reside?

A. I reside about two miles from the town of Ferndale.

Q. When did you first come to this Bay?

A. I first came to this Bay in the winter of 1858.

Q. How long have you lived here since that time?

A. I went up sound lat-er portion of the winter of 1858 and spring of 1859 I came down, and my permanent residence has been here ever since.

Q. Ever held any official position in this county?

A. I have.

Q. What?

A. Probate judge.

Q. Ever known Betsy Jones?

A. I did.

Q. Thomas Jones?

A. I did.

Q. Where did you know Betsy Jones?

138 A. The first time I ever saw her to know her was in the summer of 1859.

Q. Where was she then?
A. She was in what was called the Jones building, in the town of Whatcom.
Q. Ever see her after that?
A. I have.
Q. Where?
A. In the town of Sehome.
Q. Ever see her in any place other than this county?
A. I have.
Q. Where?
A. The road betwixt here and Caribau.
Q. When was that?
A. That was in the spring or summer of 1863.
Q. She ever back here after that?
A. Not to my knowledge.
Q. You left here after that?
A. I lived here from that time right on the bay until about '70.
Q. Do you know when she went away from here?
A. Went away in 1862.
Q. Ever back after that?
A. Not to my knowledge.
Q. You lived here all the time?
A. I have.
Q. How many people here at that time?
A. I suppose there was not over one hundred and twenty people.
139 Q. Do you know a man named Seth Doty?
A. Yes, sir.
Q. What was he doing here?
A. First time I knew him he was keeping trading post in the county-seat.
Q. Was he a lawyer?
A. I don't know whether he was a lawyer or not. He use- to practice as justice of the peace and help them out if they got into any difficulty. He was a pretty good talker. I don't know whether he was a lawyer or not. In them days any person considered a good talker could go and plead a cause, whether he was a lawyer or not.
Q. What kind of a place was this where Betsy was living?
A. It was a little place on the side of the road where you could stop and get a meal.
Q. Who was she living with?
A. I could not tell you who she was living with. I could not tell.
Q. What was his name?
A. I don't know his name.
Q. Did you know his business?
A. Did not do anything when I was there; bringing in wood and waiting on the house.
Q. Was it in a town?
A. No, sir.
Q. How far from Yale?
A. 180 or 220 miles. I could not tell the distance.

140 Q. How far from Westminister?

A. I suppose in the neighborhood of three hundred miles from Westminister, as near as I can get at it.

Q. Do you know anything about the claim known as the Jones claim?

A. I know what was called the Jones claim here.

Q. Do you know where it is?

A. Back of Sehome.

Q. Do you know where it is from being on the ground?

A. I have been on the ground.

Q. How was that land in 1862 and from that on?

A. In 1862 I went up there and went back of the cabin 100 yards. There was only a dim trail at that time, and when I got to the house I could not consider there was any improvements around the house except a few rails around for a fence.

Q. Was anybody living there?

A. No, sir.

Q. What kind of condition was the house in?

A. Log cabin standing there; it was open; looked like the door had been broken off; it was not closed; looked like it had been abandoned.

Q. How large a place was there cleared there?

A. I suppose it might be fifteen or twenty feet; large enough to put a house on; everything growing around the door.

Q. You lived around here all that time?

A. I was a permanent resident of this place from 1861 up to 1870.

Q. Do you know the general reputation as to whose claim
141 that was?

A. I diden't know it by any other name but Jones' donation claim.

Q. Do you know Captain Eldridge?

A. Yes, sir.

Q. Was he in possession of the property at that time?

A. I diden't know he had any title to the claim until about five or six years ago.

Q. Five or six years ago?

A. Yes.

Q. How did you know then?

A. I did not know that he had any title then. I saw an article that was published that Hugh Eldridge and Bartlett had gone to the land office to prove title for some claim. I thought he was going to file pre-emption on it.

Q. What was the general understanding as to whose claim that was?

Mr. KERR: We object, as it is incompetent and immaterial.

A. I never knew it to be anything else but the Jones claim.

Q. What were you doing; working here?

A. I was working in the mines.

Q. What part of the work were you doing?

A. What they called the carpenter-work below.

Q. Use any props in those mines?
A. Yes, sir.
Q. Have anything to do with them?
A. I had to put them in the cars and set them up alongside the chutes.
Q. Do you know where they came from?
142 A. Some I do and some I don't.
Q. Tell what you know.
A. There were some from six to nine inches.
Q. Where did you get them?
A. Right along the beach. It was easiest to throw them into the bay and raft them out. Large rafts were brought in here and reported to come from the islands.
Q. Do you know if any came off the Jones claim?
A. I never saw any indications of any being cut up there.
Q. How far from the Jones claim was the mines?
A. That I could not tell. It seems a quarter or one-half a mile trail I went over.
Q. Any place nearer than that where they could cut props?
A. The most of the props I know anything about was being cut right along on the beach forty or fifty yards back. They would take those most convenient.
Q. In those days when you wanted props would you go and cut them where you wanted to or get permission?
A. I never asked permission to cut a stick of timber on a claim here.
Q. Ever cut any?
A. I did.
Q. Did these people ask permission?
A. I don't know whether they took the trouble to ask permission.
Q. Was the timber of any value?
A. Not considered much value; only certain portions, and that would be saw-logs, but they were bigger.

Cross-examination.

By Mr. THOMPSON:

143 Q. Did you know in those days where the boundaries of the Jones claim were?
A. No, sir.
Q. Do you know where the boundaries are?
A. No, sir.
Q. Do you know whether the cabin that was up there was on the Jones half or his wife's half?
A. I do not. So far as I know it was a cabin known as the Jones cabin. I could not tell whether it was or not.
Q. There was a cabin there commonly known as the Jones cabin?
A. Yes, sir.
Q. The props used in the coal mines were cedar, were they?
A. They were cedar if they could get them; they would accept fir, but did not want it.

Q. The particular size and age of cedar that was adapted well to that purpose was not very plentiful except in placed around about the Bay at that time?

A. No, sir.

Q. Men took contracts to furnish these props, and they wanted to cut it where they could get it most conveniently?

A. Yes.

Q. You don't know now whether any of that cedar came from the Jones claim, do you?

A. No, sir.

Q. You did not know at the time whose land they were getting those props from?

A. No, sir.

144 Q. Would the men tell you where they cut them?

A. No, sir.

Q. Are you not mistaken in saying Mrs. Jones left the Bay in 1862?

A. No, sir; I am not.

Q. What time did she leave here?

A. I think she went—I think she was gone about three weeks and returned.

Q. What time was that?

A. In the spring of the year. She came here in a canoe, and her face had the reflection of the sun and was burned, and she asked me to get her some deer tallow to grease her face, as she was going to British Columbia. I could not get her to come ashore. I got the tallow and she got about one hundred and fifty yards from the beach, and then the sheriff went out to arrest her and she was a crying and screaming, and the man with her said these words: "It is a dam- shame for people to go and mistreat a woman that way." He brought her back.

Q. What time in 1862 was that?

A. The latter part of spring or early part of summer.

Q. Previous to that time she had been here for about three weeks?

A. I think it was three weeks.

Q. What time in the year did she come here first?

A. She may have been here for three weeks for what I know. She came here to get some stuff she had.

Q. Then, if she executed a power of attorney to her husband in the early part of spring, in 1862, she might have executed it here?

145 A. She might; she was here at that time.

Q. In 1862?

A. Yes, sir.

Redirect examination.

Mr. BLACK:

Q. When did you say you came here?

A. Fall or winter of 1858, you might call it.

Q. When did you go to B. C.?

A. In 1858.

Q. How long were you up there?

A. Until cold weather set in, and then I came to the sound here and then went to Samish. I stopped there until Christmas and then went to Port Blakely, and then in the spring of 1859 I returned to Whatcom county.

Q. Was Betsy Jones here in 1859 when you came back?

A. Yes, sir; in summer of 1859—keeping boarders.

Q. Here in '60?

A. Yes, sir.

Q. What was she doing then?

A. Living in a house right over in Sehome; afterwards Mrs. Peterson or Smith lived in that same house. That was after she left here.

Witness excused.

146 Mr. ROGERS, the witness, being produced, duly sworn, and examined, testified as follows:

Examined by Mr. BLACK:

Q. What is your full name?

A. A. A. Rogers.

Q. Where do you reside?

A. In Whatcom.

Q. What is your occupation?

A. I have been in the real-estate business most of the time—selling property.

Q. How long have you been at this point?

A. The last time nine years.

Q. When did you first come here?

A. Fourteen years ago; probably fifteen.

Q. How long did you reside here the first time?

A. About two years here and at Ferndale.

Q. Where did you go then?

A. Over east of the mountains. I have been in the Territory all the time.

Q. What has been your business?

A. Since I been back last time, real estate most of the time.

—. Do you know the approximate location of the tract of land known as the Jones claim?

A. I know where it is; yes, sir.

Q. Do you know the character of the land as to what it is covered with; is it cleared or timbered or what?

A. It is timbered.

147 Q. What is the character of the timber, heavy or otherwise?

A. Some broken lots of light timber, good deal of underbrush—that is, in some portions of it. There was some brush on it six inches and a half through; other parts rather heavily covered with cedar and fir.

Q. You have been over the whole claim?

A. I have been over that whole country back there.

Q. Do you know of the half patented to Betsy Jones?

A. I don't think I could find the lines of the half. I believe the half lays on this side, partially back, but I don't know exactly.

Q. You ever been over it?

A. Yes; I think so.

Q. How long ago was the first time you went over this claim?

A. The first time was the first summer I came to the town. I was over it, I think, twice, but I did not take any observations; I was simply running over the claim and looking at the country. I know I was on the property from the location of the property afterwards.

Q. Ever on it afterwards?

A. Yes.

Q. How long after that?

A. After that, I think it was about near nine years ago.

Q. Ever been over since that?

A. Yes; many times.

Q. Any evidences of clearing or cultivation or occupation of it prior to four or five years ago?

A. I don't think there was.

148 Q. Any evidences of ancient chopping on any of it?

A. Do you mean slashing or trees cut down?

Q. I mean the cutting of timber.

A. I have seen timber cut off—for instance, a tree that was used for a certain prop might be; cutting out timbers that had to be used in the new chutes that were built. They were built before I came here. I have seen timber cut for that purpose; that was all I ever saw that was cutting for timber.

Q. Where was that?

A. That was close back on the land, as near as possible; whether on hers or his, I can't say.

Q. Do you know what the general reputation — as to who owned the claims when you first came here?

A. What I have heard is all I know.

Q. What do you mean by that?

A. What people generally said about it.

Q. What was that?

A. That it was the Jones donation claim.

Q. Do you know Captain Eldridge?

A. Yes, sir.

Q. Ever hear anything said about his ever having the claim?

A. Not at that time; no, sir.

Q. When was it first spoken of that he had claim to it?

A. I think possible five years ago. I had no idea that he owned any of it.

Q. Was he doing any acts in the way of cutting timber or doing anything over there?

149 Mr. KERR: We object to that as leading.

Question withdrawn.

Q. You may state whether any acts toward cutting timber or in any way to improve that land was done by any person during the first two years you were here.

A. I don't think there was.

Q. You may state when the first act of any kind toward improvements, if any were ever done, were done by any person.

A. The first I ever knew of any improvements being put in there was, there was a house standing on the bank about 200 feet, I think, this side of the Jones donation claim line, on the hill, right where the school-house stands. There was a house standing there and ground up around with brush and small timber. There might have been some done, but not since that until recently. Aside from that, the first improvements that were made was about four years ago. We went to work to put a public highway through there.

Q. They cut through both parts of the claim, did they?

A. I don't remember whether it run through both parts or not. I think it did, but am not pos-tive.

Q. Who did that?

A. Mr. Maresch, the district supervisor.

Q. Prior to that time was there any roads or paths?

A. There was a path that struck over the claim, that run across, that was cut by parties living in Fairhaven.

Q. Do you know where that went from?

A. There was a path went from the camp into town—into Whatcom.

Q. Do you know whether there is any improvements now
150 on the east half—Betsy Jones' half?

A. I have not been over there for the last year. The last I was over there I know of none.

Q. Do you know the clearing made for the reservoir?

A. Yes, sir.

Q. Was it on that tract?

A. I am not well enough acquainted to say whether it was on that part or not.

Q. Do you know whether the west half has ever been cleared and house built on it?

A. I think it has; some portion of it.

Q. Do you know when that work was first begun?

A. About three years ago; between two and three.

Q. Any work done by anybody before that time?

A. Not to my knowledge.

Q. You living here all the time?

A. I was, most all the time.

Q. I understood you to say you were in the real-estate business.

A. Yes, sir.

Cross-examination.

By Mr. KERR:

Q. When did you first come here, Mr. Rogers?
A. Fourteen or fifteen years ago.
Q. That is the first time you came?
A. Yes, sir.
Q. You don't know what was done on this claim prior to that time?
151 A. No; I could not say previous to that.
Q. How many times do you think you were on that claim?
A. That is a pretty hard question to answer. I have been over it two or three times a year, or sometimes that many times a month.
Q. How long had you been over it as frequently as that?
A. Nearly fourteen years ago. I could not know much about it.
Q. What you know about it is mostly what you know in the last four or five years?
A. Last seven or eight years.
Q. This last trail you spoke of as having been cut through—you never was over that trail?
A. I never was over that trail. That was for provisions.
Q. You simply had no personal knowledge of the fact that Mr. Eldridge owned the land until five years ago?
A. That is what I have understood.
Q. You want the court to understand that Jones was reputed to be the owner?
A. I want it understood that I stated I knew it as the Jones donation claim, and that is all.
Q. Just as you knew of the other claims, the Morrison and Peabody claims and the others?
A. No; I know that they own them.
Q. You know the old claims go by their owners' names?
A. They go by the name yet.
Q. That name is still attached to them?
A. The Utter claim is not spoken of as that now.
Q. The Padden claim—you have heard of that, have you not?
A. I have.
152 Q. Whether he owned it or not, you don't know anything about that?
A. I don't know much about that.
Q. Did you ever hear the ownership of the Jones donation claim discussed among people generally fourteen years ago? I am talking about the ownership of the claim.
A. No; I don't think there was ever any questions brought up in that time as regards these claims, as there was no one here to talk the matter over. It was not as it is now.
Q. Prior to six or seven years ago, how many times were you on the claim?
A. I could not give no idea of it; over it a good many times.
Q. In going over it did you follow the trails?

A. Sometimes followed the trails and sometimes crossed the timber. There was no trails except those made by animals.

Q. No Indian trails over it?

A. Not that I saw.

Witness excused.

FRANK H. REID, witness, being produced, duly sworn, and examined, testified as follows:

Examined by Mr. BLACK:

Q. Mr. Reid, what is your occupation?

A. Civil engineer.

Q. How long have you been engaged in that occupation?

A. A little over twenty years.

153 Q. Where do you reside?

A. Whatcom.

Q. How long have you resided here?

A. About nine years.

Q. Do you know the location of the east half of the Jones donation claim?

A. I do.

Q. Do you know the location of the west half of the Jones donation claim?

A. I do.

Q. How did you acquire that knowledge?

A. I run the lines.

Q. At whose request?

A. Mr. Dibble's.

Q. Have you been in the court-room for the past day or two?

A. I have.

Q. Have you heard the testimony relative to the cabin supposed to be on the Jones donation claim?

A. I have.

Q. Do you know the location of that cabin, or, rather, the remnants of it?

A. I know where the foundation is of the old cabin that was built a great many years ago, reported to be the Jones cabin.

Q. You may state where that cabin is located with reference to the Jones donation claim.

Mr. THOMPSON: We object, as it is incompetent. This witness has not shown that he knows that to be the Jones cabin.

COURT: I will permit the question and give exception.

154 A. It is 95—97½ feet due west of the station 300+46.5, commencing at the northwest corner of the claim.

Q. From the station that you refer to which way does the claim lie?

A. East.

Q. Then you may state whether the cabin is on the Jones donation claim or not.

Mr. THOMPSON: Same objection.

COURT: I will permit the question and give exception.

A. It is not.

Q. You may state how far from the Jones donation claim the cabin is located—the nearest point.

Mr. KERR: Same objection.

COURT: I will permit the question—give exception.

A. From the line to the nearest corner of the cabin is 97½ feet.

Q. How do you know that?

A. I measured it with a steel tape.

Q. I understood you to say you had actually surveyed the east half of the Jones donation claim, did I not?

A. Yes, sir.

Q. What is the character of that claim in regards to its being timbered?

A. It is all timbered.

Q. You may state whether or not, other than around the little house built thereon and other than a strip occupied by the water company, there is any evidence of any cuttings in the timber thereon.

Mr. KERR: We object to that as incompetent, immaterial, and leading.

155 COURT: I will sustain; that question is leading.

Q. When did you survey that land?

A. In the middle of September.

Q. State what you saw on the east half.

A. I saw that it was covered with timber, and I crossed three surveys that had been made within the last three or four years.

Q. Did you see any other things there in the way of clearings?

A. No; I noted no marks of any axe or work being done except where surveys had gone through.

Q. Any marks of the axe?

A. No, sir.

Q. You was all about it?

A. Yes. There was one road cut through—the old Fairhaven Southern railroad.

Q. Do you know when that was done?

A. Since this Fairhaven Company began——

Q. Within the last four years?

A. Yes; within the last four years.

Cross-examination.

By Mr. THOMPSON:

Q. You don't know whether the foundation of the old cabin you spoke of is the cabin Jones lived in or not, do you?

A. That is the cabin that has been called the Jones cabin.

Q. Do you know whether that was the Jones cabin?

A. No; I don't positively.

Q. It was simply pointed out to you as the Jones cabin. You are locating a cabin that somebody told you was the Jones cabin?
156 A. That's it.
Q. Do you know on what side of the cabin the old Jones clearing was made?
A. No; it is all cleared off now.
Q. You could not tell anything about that?
A. No; I could not tell anything about that.

Redirect examination.

Mr. BLACK:

Q. Do you know whether or not there is any other evidences of any other cabin in the neighborhood?

Mr. KERR: We object, as it is leading, incompetent, and immaterial.
COURT: I will permit the question and allow an exception.

A. There are several little cabins in that locality that has been built in the last three or four years.
Q. Old cabins, I refer to.
A. No old cabins.
Q. Do you know where the mouth of the old coal mine was, in Sehome?

Mr. KERR: We object, as that is not proper redirect examination.
COURT: I will permit the question and give an exception.

A. I have been at the entrance of the old coal mines a number of times since I have been here on the bay and to the holes that were caused by the dirt caving in and all over the old works where the engone-house used to stand.
Q. In reference to that place, in which direction and about how far would the remnants of this cabin be to which you *re* refer?
157 A. This cabin is right up the hill from the mouth of the shaft.
Q. About how far off?
A. I could not tell, as I have never measured it.

Witness excused.

Mr. COSGROVE, the witness, being produced, duly sworn, and examined, testified as follows:

Examined by Mr. BLACK:

Q. Give your full name.
A. Edmund Cosgrove.
Q. Your occupation.
A. Real estate.

Q. Ever interested in York addition?
A. Yes, sir.
Q. Do you know the tract of land lying south of that; do you know what tract lies south of the York addition?
A. Yes; I have heard it called the Jones claim sometimes.
Q. Ever been over the eastern part of the tract referred to as the Jones claim?
A. We were on it and looking for the line of our claim in the York addition. I know we were on it. I walked over quite a little ways through it.
Q. When was that?
A. In the summer of 1888—July or August.
Q. What was the character of that land; was it cleared?
158 A. No; I did not notice any clearing.
Q. Was it timbered?
A. Timber on it—wild.
Q. Any evidence of timber or trees being cut on it?
A. Not that I saw.
Q. On it more than once, were you?
A. The east portion, I don't remember of being on it more than once. It was in the woods; I could not tell.
Q. Were there any roads to it?
A. Not that I saw.
Q. Any roads to the York addition, were there?
—. There was a kind of an old trail. I went along a line between the York addition and that claim, and that claim and the company's claim. A line had been cut out, or a road; something like that.

Cross-examination.

By Mr. THOMPSON:

Q. The York addition was located partly on that claim. You bought a strip, did you not?
A. I believe so.

Mr. BLACK: We object to that as not proper cross-examination.
COURT: I will allow the first question, but as to title I will sustain objection.

Q. I believe you were asked on direct examination if you were not one of the owners of the York addition.
A. Yes, sir; I think I was.
Q. You answered that you were one of the owners, did you not?
159 A. I did.
Q. State whether or not Mr. Dibble was associated with you as owner of the York addition, dealing with the property claimed to having been owned by the York addition.

Mr. BLACK: I object as not proper cross-examination; also tending to show by parol that which is manifestly contained in better class of evidence.

Mr. THOMPSON: I am not endeavoring to ascertain absolute title of this property.

COURT: I suppose to go outside of that it would not be proper. I will give an exception.

Q. If the defendant Dibble was interested with you in the York addition and if he was interested in purchasing the trac- of land between the York addition or off the Jones claim, to determine the York addition, state with whom such dealings were had and who was recognized as owners of that strip of land that you desired to purchase.

Mr. BLACK: We object as not proper cross-examination.

COURT: I will sustain the objection and give an exception.

Q. How long have you lived here on the bay?

A. I think since the summer of 1888.

Q. Who has been the reputed owner and in possession of the Jones claim since you have been here?

A. Well, I understood it belonged to Mr. Eldridge when I first came here; I understood it.

Q. Have you understood it changed hands?

A. I have learned that it had. There was some conten-
160 tion about the title.

Q. Did you understand that Eldridge had conveyed portion of it to the Bellingham Bay Land Company?

A. I understood something to that effect.

Witness excused.

Mr. BLACK, witness, being produced, duly sworn, and examined, *and* testified as follows:

Examined by LEAMING:

Q. Where do you reside, Mr. Black?

A. Near the city of New Whatcom.

Q. Your occupation?

A. Attorney-at-law.

Q. Do you know of your own knowledge who were the heirs of Betsy Jones, deceased?

Mr. THOMPSON: We object to it as incompetent and immaterial.

COURT: I will not rule on that question at this time, but will permit him to answer.

Objection overruled. Exception allowed.

A. I do.

Q. State whether or not you are personally acquainted with them.

Mr. THOMPSON: Same objection.

COURT: Objections overruled and exception allowed.

A. I am.

Q. Who are they, and where do they reside?

161 Mr. KERR: Same objection; not proper way to prove heirs.

COURT: Objection overruled. Exception allowed.

A. Betsy Jones dies intestate without children.

Mr. THOMPSON: You speak from your own personal knowledge?

A. I do. She left her surviving one sister of the whole blood named Mary Lovatt, residing at the present time, or at least in April last, on High street, Hanley, Staffordshire, England. She left also three children of the deceased sister, named, respectively, Rosanna Carter, William Hill, Mary Wilkes, all residing in Hanley and suburbs, and they, together with the sister named, are the only heirs-at-law of Betsy Jones.

The stenographer is handed a certified copy of the deed from Mary and William Lovatt to Carmi Dibble, dated 7th day of May, 1891, recorded in the auditor's office of Whatcom county, volume 25 of Deeds, page 31, on the fourth day of June, 1891, and is asked to mark the instrument Exhibit "1," of defendants, for identification.

The stenographer is handed certified copy of deed from Rosanna Carter and James Carter, her husband, and William Hill and Mary Wilkes and Joseph Wilkes, her husband, of the first part, and Carmi Dibble, of the second part, dated 8th day of May, 1891, and recorded in the office of the auditor of Whatcom county, in volume 25 of Deeds, page 32, on the 4th day of June, 1891, and asks that it be marked Defendant's Exhibit "2," for identification.

Mr. LEAMING: The witness is handed Defendant's Exhibits "1" and "2" and is asked whether he is the attesting witness whose name appears in these instruments.

162 A. I am.

Q. State whether these instruments, respectively, were signed by the parties purporting to have signed them in your presence.

A. Do you refer to the grantors in the deed?

Q. I do.

A. They were.

Mr. THOMPSON: We make the objection that this is immaterial and incompetent evidence.

COURT: Objection overruled. Exception allowed.

Q. State whether or not the grantors named in these deeds, Exhibits "1" and "2," of defendants, are the same identical persons as you just named as the heirs of Betsy Jones, deceased.

Mr. THOMPSON: We object because it is incompetent and immaterial, as assuming the proof of a fact concerning which it is physically and absolutely impossible for this witness to know the truth or to state it, the heirship of these people.

COURT: I will consider your objection with the others that I have not ruled on. Objection overruled and exception allowed.

A. They are, with the exception of the three husbands who signed the deeds. The three women's names that appear as grantors, namely, Mary Lovatt, Rosanna Carter, Mary Wilkes, and the man named William Hill are the identical persons that I named as heirs of Betsy Jones.

Q. The others are, respectively, the husbands of these parties?

Mr. KERR: Same objection, as leading.

163 Q. State what relation, if any, the other parties signing bear to the heirs.

A. Respective husbands.

Mr. KERR: Same objection.

COURT: Objection overruled. Exception allowed.

A. I would like to state that to these two deeds, acknowledgement——

Mr. KERR: We want to object to any statement to be made by counsel, for the reason that response to the question is incompetent and immaterial.

COURT: Objection overruled. Exception allowed.

A. The acknowledgements of each of these instruments is taken or purports to be taken before Michael Huntback, mayor of Hanley.

Q. State whether you have any knowledge of this individual, and the official capacity of this individual.

Mr. KERR: We object as incompetent and immaterial.

COURT: Objection overruled. Exception allowed.

A. These instruments were, each of them, acknowledged in the presence of myself and Michael Huntback, who took the acknowledgements. Michael Huntback, at the time of the taking of these acknowledgements, was the mayor of the borrough of Hanley, Staffordshire, England, and was acting in that capacity.

Mr. KERR: We move to strike out the last portion of the answer with regard to acknowledging officer being mayor of the province of Hanley, for the reason that it is not best evidence.

Cross-examination.

By Mr. THOMPSON:

164 Q. How long have you lived in the State and Territory of Washington?

A. I am not pos-tive as to the date I arrived in the Territory of Washington. I left Cape May city, New Jersey, on the 6th day of September, 1889; came direct through. I think it was thirteenth or fourteenth day of that month I arrived in Seattle.

Q. Of what year?

A. 1889.

Q. About three years ago?

A. Not quite; a little over two years.

Q. How old are you?

A. I was thirty-three years old on the 16th of November last.
Q. Did you ever know Betsy Jones?
A. I never saw her.
Q. Do you know her?
A. By reputation.
Q. By reputation only?
A. I know more of her than by reputation.
Q. Did you ever have any personal acquaintance with her?
A. None other than that acquired by—no personal acquaintance in the sense you ask, by personal contact.
Q. Did you ever see her?
A. No, sir.
Q. Did you ever hear of her prior to three years ago, when you came here?
A. I never did.
Q. All you know you learned since the date you came here, three years ago?
165 A. What I have learned relative to Betsy Jones has been acquired in several ways.
Q. I will ask as to the time—all *re*quired since?
A. All since I came here.
Q. The general understanding is that she died several years prior to the time you came here?
A. The fact is she died some years prior to that time.
Q. About when did she die?
A. She died about 1866. There is some little dispute as to the exact date.
Q. You state of your own personal knowledge she is dead?
A. I do.
Q. How did you learn the fact?
A. I learned the fact by evidence, some of which is competent and some of which is not competent. Knowledge and personal knowledge are relative terms. You really know things by seeing them, by feeling them in many instances, and in numerous ways. I know personally that Betsy Jones is dead by reason of conversation with her immediate friends, with persons who knew casually, by general repute, by affidavit.
Q. You are a lawyer by profession?
A. I am.
Q. How long have you been practicing?
A. Since November, 1881.
Q. You understand the difference between personal knowledge and facts?
A. I think I do.
166 Q. Do you not know what has been told you in various ways by other people is hearsay?
A. It is not according to legal writers on evidence.
Q. Who first informed you of Betsy Jones' death?
A. I don't remember; my impression is that it was Carmi Dibble, but I am not positive.
Q. About when did you first learn of her death?

A. Upwards of a year ago.

Q. How do you know of your own knowledge Betsy Jones died intestate?

A. I possibly should have limited that statement to the fact that she died intestate so far as the county of Whatcom was concerned, although I believe my knowledge is personal when I say she died intestate. I know she died intestate so far as Whatcom county is concerned in that I have examined the records of Whatcom county and find an application based on affidavits for the appointment of an administrator of the estate of Betsy Jones, and find that that proceeding is still pending, and that no probate of any will in this county has ever been made or admitted, which, in my judgement, is knowledge of the fact, so far as Whatcom county is concerned, she died intestate. I know by declarations made by members of the family of Betsy Jones and all the immediate family of Betsy Jones that she is so reported to have died. I know by declarations of other persons, by general repute, that she was reported to have died intestate. I should possibly have limited that statement to Whatcom county.

Q. You mean to say simply there has been no will filed in
167 Whatcom county, and no probate of any will, so far as you know?

A. I have examined the records and found none, and that is intestacy until the will is proved.

Q. You procured those deeds concerning which you have been examined, did you?

A. What do you mean by the word procured?

Q. I mean went to the place where the parties who executed these deeds lived and negotiated for this property, representing Mr. Dibble, and made this transaction and procured the deeds in pursuance of transactions you had made.

A. I did.

Q. Where did you find the grantors named in these deeds?

A. You mean the general locality?

Q. The country and general locality.

A. I first found Mrs. Mary Lovatt at her house at the end of a little court on High street, in Hanley.

Q. What country?

A. England, county of Staffordshire.

Q. Where did you find the others?

A. In the same locality. The country there is very thickly settled. They call the place Badley hedge. It is the same relation as Old Whatcom is to Sehome.

Q. How long were you there negotiating with these people for this tract of land?

A. I was not negotiating with them very long. I was there some three weeks. The time I was there was occupied almost exclusively in acquiring the knowledge I have testified to.

Q. You speak of having personal knowledge that these people were the heirs?

168 A. I have.

Q. Where did you get that personal knowledge?

A. From an examination of the records of the various parish churches in which Betsy Jones herself was married and in which the various immediate members of her family were married, by declarations made to me by the rectors, vicars, and curates of the parishes where they resided, by declarations made to me by the heirs themselves, by declarations made by members of the family, and by the general repute of the community in which they resided. There may have been other sources of knowledge that I have omitted; and also by examining old letters purporting to come from Betsy Jones to all parties, of which I spoke, in which she designated them by name as her sisters and one as brother, who has since died, and by several family papers and one or two entries in the family Bible.

Q. How do you know that brother is deceased?

A. I know by declarations of members of the family and by the statement and certificate or the certificate of death of the entry in the book kept by the rector of the church.

Q. How much was paid to these grantors of these deeds for that?

A. At least the amount named as consideration in these deeds.

Q. At the most.

A. Unless called upon I will refuse to answer, as it is immaterial.

Mr. LEAMING: We object to the question, in the first place, as it is not cross-examination of this witness, and, in the second
169 place, it is wholly immaterial, for we are willing to stand on the consideration. It is in no event material. If we are willing to stand on the minimum there is no power on earth that will compel us to disclose the entire amount. There is no purpose in it.

Mr. THOMPSON: I have a right. It goes to question the good faith in the cause.

COURT: I will give him the privilege to answer the question or not to answer.

Mr. LEAMING: We decline to answer as to the excess over the amount named that he has paid, but admit that an excess was paid.

Q. What, in your judgment, was the value of that claim at the time when these deeds were obtained?

A. I am not an expert on the value of real property.

Q. What is your best judgement on that subject?

Mr. LEAMING: We object as not cross-examination at all.

Q. You say there was an excess over and above the amount named in those deeds paid at the time when the deeds were procured?

A. I so stated.

Q. What was the amount of that excess?

Mr. LEAMING: We desire the witness not to answer, under privilege of the court.

COURT: I will give him the privilege to answer or not answer. Exception given.

Q. Have you any interest in the result of this suit?

Mr. LEAMING: We object to that as entirely immaterial,
170 whether the witness has any interest or not.

COURT: I will allow the question and give exception.

Q. Will you have any interest in the event of this suit?

A. I will receive compensation, if you call that interest.

Q. Will you receive compensation by way of interest in this land claim?

A. I refuse to answer.

Mr. KERR: We insist on an answer.

A. I stand on privileges, your honor. I refuse to answer.

COURT: The witness is required to answer unless he thinks it will criminate him.

A. Do I understand the court to say that the court compels me, against my will, as attorney-at-law, acting as witness on the stand, to divulge that which I have acquired by reason of conference with my client?

COURT: I simply ask you to answer the question as put by counsel, on the grounds that I have named.

A. I will state that I cannot do so without divulging that which I have learned from my client. If you desire me, I will be compelled to do so.

COURT: I will sustain the objection to that question. Note exception. Exception allowed.

Q. State whether or not you yourself or your firm have a written agreement with Mr. Dibble concerning any interest in this land which you are to have as a contingent fee in this case.

Mr. LEAMING: Same objection. The counsel objects to the question.

171 COURT: I instruct the witness at this time that he can answer or not answer without further hearing on the question.

A. Neither I myself nor the firm of which I am a member have any written agreement with Mr. Dibble with relation to this suit. At least I have not and the firm has not, to my knowledge.

Q. Are you not, as a matter of fact, to become a joint owner with Mr. Dibble in this property in the event of his recovery in this suit?

Mr. LEAMING: Same objection as made to question before.

COURT: I will instruct the witness to answer it or not answer it. Exception given.

A. I am unable, without discloses confidences received by me in the course of my business as attorney-at-law with my client, to answer that question.

Q. What other persons, if any, besides yourself and Mr. Dibble

are to have an interest in this land in the event of its recovery in this suit?

Mr. LEAMING: We object, as it is entirely immaterial.

Mr. KERR: We want this record to show that counsel for the plaintiff insists upon the court directing the witness to answer the question.

COURT: You may answer that question.

A. Your honor, I am unable to answer that question without disclosing confidences received by me as attorney from my client. If I am ordered by your honor to do so, I can.

COURT: I don't know but that question he should answer. I give you the alternative to answer or not to answer. I will
172 permit the witness to answer.

A. At the request of Mr. Dibble and under his instructions I purchased this land in question from the heirs of Betsy Jones, and it was taken in his name. To my knowledge there is no written agreement of any kind by Mr. Dibble with any person whereby any part of that land is by him agreed to be conveyed to anybody in the event of a favorable termination of this suit.

Q. Do you know whether any person beside Mr. Dibble furnish- any portion of the money which was paid for this land?

A. The money which was paid for this land was paid by Mr. Dibble.

Q. Do you know whether he got any portion of it from anybody else?

A. I don't know anything about Mr. Dibble's business.

Q. You stated there was no written agreement. Is there any verbal agreement or tacit understanding that any person outside of Mr. Dibble shall have an interest in this land?

Mr. LEAMING: Objection made by Mr. Leaming and overruled.

COURT: I presume he can answer the question.

A. I was paid by Mr. Dibble a certain sum per week while I was gone and expenses and what money was necessary to pay for the acquiring of this title; there was no express understanding; it was tacitly understood, however, that I was to receive a greater compensation in the event of success in finding them.

Q. That compensation was to be in lands from this claim,
173 was it not?

A. I don't know that that was ever agreed upon.

Q. Was it not understood; is not that the understanding you have now?

A. I said there was no written agreement.

Q. Is it not understood you have an interest in that land in case of its recovery in this suit as compensation for this suit?

COURT: Let the record show that I will let the witness answer or not answer and give exception.

A. I will say this: I have no expectation, present or future, to receive from Mr. Dibble anything other than certain charges that

are entered on our books of account and to be entered in the progress of this trial, and that I have no written agreement or any understanding, verbal or otherwise, whereby Mr. Dibble agrees to give me anything other than that.

Q. What proportion of the value of these lands do these charges cover?

A. I am not sure, exactly, what they amount to. I am of the impression it runs about seventy-five dollars a day, time actually employed, on our books.

Q. What proportion of the value of this land will it amount to?

A. I don't know. I don't know what the land is worth.

Q. Who, if anybody, is interested in this matter besides Mr. Dibble? And explain the arrangements you have made concerning your own services.

A. Mr. Leaming is interested in half of my own services.

174 Q. Anybody else interested with Mr. Dibble in the matter?

A. Not that I know of.

Mr. THOMPSON: We make a motion to strike out all of the testimony of this witness referring to the death of Betsy Jones, because it appears from the testimony of the witness that the witness did not speak from personal knowledge, but from hearsay, and the evidence is not the best evidence or not competent evidence in the case.

COURT: Motion denied and exception allowed.

COURT: I will pass upon your motion with the other motions in the case; not now, but at the time I pass of the others.

Mr. THOMPSON: The plaintiff further moves to strike out the testimony of the witness concerning the fact of Mrs. Jones dying intestate, for the reasons that it appears conclusively that the witness had no personal knowledge on that question, and that the whole of his testimony is hearsay and incompetent as evidence. The plaintiff further moves to strike all of the testimony of the witness concerning the grantors to the defendant in the case being the heirs-at-law of Betsy Jones, for the reason that it conclusively appears that the witness had no personal knowledge on that subject, and that his entire testimony relating thereto was hearsay and not the best evidence and incompetent.

COURT: I will pass on that with the others that I have taken under consideration in the case, and in pursuance of that understanding now allow the motion to strike and allow exception.

Mr. BLACK resumes:

175 A. I would like to state that one of the reasons for asserting the intestacy of Betsy Jones is the fact that to my knowledge twenty-five years have elapsed since her death and no probate proceedings have been taken. I desire also to identify before I leave the stand certain papers that possibly may be offered in evidence.

Mr. LEAMING: Papers to which you have testified relating to matters to which you have testified as to heirship and relationship of these parties?

A. Yes, sir.

Mr. THOMPSON: I will move to strike out explanation of witness for the reason that it is incompetent; no amount of reasons which can be assigned as tending to prove any personal knowledge on the part of witness of anything about which he has testified.

COURT: Motion allowed and exception given.

Mr. LEAMING: The witness is handed instruments marked for identification Exhibits "3" & "4" on the part of defendant and asked to identify the instruments.

Mr. THOMPSON: We object to that as not proper redirect testimony.

Mr. LEAMING: I will ask the privilege to recall the witness to these matters; and, furthermore, I think it will come under the rule.

COURT: I will give you the privilege to recall witness if you so desire.

Witness recalled.

176 A. The first paper, Exhibit "—," that you hand me is paper signed by——

Mr. THOMPSON: The paper will show for itself.

COURT: That objection is well taken.

Mr. THOMPSON: We object to any testimony concerning this paper for the reason that the paper itself appears on its face to be not a paper admissable in evidence in this case, and it is not properly certified to and purports on its face to be a copy, and that the custodian of the original had no right to make any certificate.

Mr. LEAMING: I will state to the counsel that this identification is to show that these instruments are true copies of the parish records of the different parishes from which they come, and that they have been carefully compared by the witness, and also to identify the signatures to these instruments as those signatures of the different parties.

COURT: I will sustain the objection.

Mr. LEAMING: We wish to identify by the witness the exhibits we have had the stenographer mark for identification "3, 4, 5, 6, 7, 8, 9, and 10" as true copies of the parish records of England relating to the genealogy of the Jones family—I should say of Betsy Jones; to have the witness identify these as true copies of these records by actual comparison made by himself, and also offer them, in addition, by reason of the certificates attached to them by English records.

Q. Will you identify these as true copies of records of which they purport to be copies?

177 A. I identify these various exhibits as copies of the records of that which they purport to be, compared by me at the time, and also the signatures of the vicars and curates purporting to have signed them, identifying them as those signatures made in my presence by the men generally reputed in the community in which they resided to occupy the position certified to by them to be their signatures in each case; and, further, that those men are the

custodians of the records of which these certificates purport to be copies, which records are kept in the archives of the various churches from which they purport to come.

Q. And they purport to contain what?

A. The marriages——

Mr. KERR: We object to that as incompetent.

Mr. LEAMING: With these identifications we will make a formal offer in evidence.

Mr. THOMPSON: We make the objection that they are not properly proven, incompetent, and immaterial.

COURT: I will sustain the objection and allow you an exception.

Mr. LEAMING: We offer in evidence, now, the Exhibits Nos. "1" and "2" on part of defendant.

Mr. THOMPSON: We make the objection to each deed specifically that it is incompetent and immaterial, in that the deeds are not properly proven, certified, or acknowledged, and in that the persons who made the deeds are not shown to have had any interest whatever in the property admitted to be conveyed by them.

COURT: I will pass on that objection that is made same as
178 the other objections and permit the deeds to be filed and allow an exception.

Witness excused.

Mr. DIBBLE, witness, being produced, duly sworn, and examined, testified as follows:

Examined by Mr. BLACK:

Q. Where do you reside, Mr. Dibble?

A. In New Whatcom.

Q. You are the defendant in this suit?

A. Yes, sir.

Q. How long have you resided in New Whatcom?

A. Not quite four years.

Q. Are you familiar with the land known as the east half of the Jones donation claim, the land in dispute in this case?

A. Yes, sir.

Q. Ever been on it?

A. Yes, sir.

Q. When were you first on it?

A. Well, I was on the survey when it was surveyed in September, three years ago; I was on it before that, but I don't recollect the time.

Q. Ever been over it carefully?

A. Yes, sir.

Q. When?

A. When that survey was made and a great many times since.

179 Q. What was the character of the land at that time, so far as being cleared?

A. No clearing on it.

Q. Any evidences of any cutting or clearing having ever been made on it?

A. Never.

Q. Any stumps on it?

A. No, sir.

Q. Anybody, so far as the land is concerned, exercising any ownership over it?

A. No, sir.

Q. You have been in the court-room the last day or two?

A. Yes, sir.

Q. Hear the testimony relative to a cabin known as the Tom Jones cabin?

A. Yes, sir.

Q. Know where that was?

A. Yes, sir.

Q. On that claim?

A. No, sir.

Q. Claim known as the Jones claim?

A. No, sir.

Q. How located with reference to Thomas Jones' claim?

A. About 95 feet west of it.

Q. Any fence or cultivation on or about it?

A. There was not.

Q. The time you spoke of, several years ago, how was the west half, or half known as the Tom Jones half, that cleared?

A. No.

180 Q. How was the cabin and thereabouts, any clearing about it?

A. Not any.

Q. Any evidence of having been any clearing there of any size?

A. No.

Q. Any evidence of not being any clearing?

A. Plenty of it.

Q. What?

A. Trees growing.

Q. How large?

A. Six or eight inches; that was called the undergrowth—underbrush—cedar trees and such like.

Q. You purchased the tract of land—this tract in question?

A. Yes.

Witness, being handed Exhibits "1" and "2" on part of the defendant, they being certified copies of deeds from several parties to Carmi Dibble, is asked:

Q. You may state whether or not you are the identical person named in these instruments as Carmi Dibble.

A. I am.

Q. You may state whether or not you heard the testimony of Mr. Reid on the witness stand.

A. I did.

Q. You may state whether or not you have, in company with

Mr. Reid, ever made any measurements relative to the location of the cabin that you referred to as the Tom Jones cabin.

A. Yes, sir.

Q. You were both at that cabin?

181 A. Yes, sir; at the foundation of it now. The cabin was there when I surveyed first.

Q. You may state whether or not at the time you acquired the deeds—Exhibits "1" and "2" I handed to you at the time you paid the consideration therefor—you had any knowledge or notice of the existence of a power of attorney purporting to be executed by Betsy Jones to Thomas Jones or any other person.

A. Merely a rumor of such a thing.

Mr. KERR: We object as incompetent, irrelevant, and immaterial.

COURT: I will let him answer and give an exception.

Q. Who did you receive that information from of that rumor? Do you know?

A. I went to De Mattos, Eldridge's attorney.

Q. Who was he?

A. Attorney here. He has an abstract office.

Q. What did he tell you?

A. He told me that there was no good title—that there was no power of attorney; that he had gone to a half-breed Indian, said to be legal heir in that estate, and fixed it up a little better.

Q. Do you know anybody named Peterson?

A. Yes.

Q. Make any inquiries?

A. I did.

Q. Of whom?

A. The man who lived by the——

Q. What relation does he bear to Mrs. Peterson, who testi-

182 fied here yesterday?

A. He is her husband.

Q. What information did you get from him?

Mr. KERR: We object as incompetent and immaterial.

COURT: I will sustain the objection and allow exception.

Q. Make any other inquiries, Mr. Dibble?

Mr. THOMPSON: We object to that and accompany the objection with a motion to strike all of the testimony which has been given on this question of diligence, for the reason that it is incompetent on the face of the record. The fact that a power of attorney was produced to the officer who took the acknowledgements, for Mr. Dibble to deny having had notice of this power of attorney and these legal matters, has not made him an innocent purchaser of this property in question.

COURT: I will allow the motion to strike out this far—that what other parties told Mr. Dibble, I will allow that part stricken out and give exception. I will deny the motion in other respects and give the other party exception.

Q. Make any further inquiries, Mr. Dibble, besides Mr. Peterson and Mr. De Mattos?

A. Yes, sir.

Q. Where else did you go?

A. I never found any one in Bellingham that said that they had had a power of attorney.

Q. Make inquiry, did you?

A. Yes, sir.

Mr. KERR: We object to that examination.

183 Q. State the character of the examination you made and the inquiry you made as to amount.

A. I have been interested in abstract books, and am today in a set of abstract books. There is nothing on record to show that there is a power of attorney or anything that will appertain to one.

Q. So far as inquiries are concerned, did you make any further inquiries than you speak of?

A. I have inquired of different parties around this town.

Q. What was the result of the inquiries you made?

A. The result was, I came to the conclusion that there was no power of attorney, and a chance to get that land.

Q. Did you do anything further than you have stated; employed anybody?

A. I employed Harris, Black & Leaming to attend to this business for me.

Cross-examination.

By Mr. THOMPSON:

Q. How did you come to be making inquiries about this power of attorney before you purchased this land?

A. I wanted to buy a piece of it.

Q. When was that?

A. Two years ago last spring.

Q. You bought a piece, didn't you?

A. Yes; a small piece.

Q. Paid money for it?

A. Yes.

184 Q. Thought you were getting a good title to the land?

A. No, sir; I knew it was not a good title.

Q. Did you have an abstract made for that property?

A. I paid Mr. De Mattos for telling me what was in that.

Q. Did you see the abstract?

A. No.

Q. Did you see abstract from these people?

A. I don't think I have.

Q. Did you ever see that deed from Captain Eldridge?

A. I seen copies.

Q. Did you see it at that time you purchased the property?

A. No, sir.

Q. You made this purchase in England before you paid the parties anything?

A. Yes.

Q. Do you not know that that certificate of officer declared that power of attorney was produced before him?

A. It says so.

Q. Did you go to Captain Eldridge and see whether there was a power of attorney?

A. No.

Q. You knew he claimed it was his?

A Ever since I was in town.

Q. Did you go to that officer and find if there was a power of attorney to Mr. Barkhouser?

A. I have seen Mr. Barkhouser.

Q. Did you see him before you bought this land?

185 A. No.

Q. Captain Eldridge lived neighbor to you for a good many years?

A. Yes; on Bellingham bay, a good many years.

Q. You see him almost every day, don't you?

A. Yes.

Q. In face of the fact that you knew he had claimed for many years to be the owner of this property, under that power of attorney, and in view of the fact that you saw recorded declarations of the officer that took Mr. Jones' acknowledgement that power of attorney had been produced to him, you went and invested this money in this property without going to Captain Eldridge?

A. He never claimed to me that he had one.

Q. Did you ever go to either of them before you bought this property in England?

A. I never said anything to him.

Q. Then you did not go in your inquiries where you were supposed to know?

A. I went to competent parties.

Q. Competent parties?

A. Yes, sir.

Q. Did you not regard the man who had bought the property under power of attorney as the best one to go to?

A. No, sir.

Q. You were trying to prove all the time—to satisfy your mind that there was no power of attorney in order to get this land?

186 A. There was none there.

Q. You were trying to find out—to ascertain that fact?

A. Yes; I was trying to find out if there was one.

Q. Under these circumstances how much did you pay for this land, Mr. Dibble?

A. The deeds call for what I paid.

Q. That all you paid?

A. It cost me more money.

Q. How much did you pay these people in England for that land?

Mr. BLACK: We object.
COURT: I will permit the question and give exception.

A. I was not there; I don't know.
Q. How much did you furnish Mr. Black?
A. I don't know how much money.

Mr. BLACK: We object to that as immaterial.
COURT: I will let him answer the question and give exception.

Q. How much money did you furnish Mr. Black in connection with this purchase?
A. Probably fifteen or sixteen hundred dollars when he went away.

Mr. LEAMING: Let the record show that we instruct the witness not to answer question- unless positively required to do so by the court, with contempt as an alternative.
COURT: I think it is a question he can answer. I did not enforce the question on Mr. Black, as he was an attorney for the witness.
Mr. BLACK. I add the further objection that it is not proper cross-examination.
187 COURT: I will have the witness answer the question.

Q. You say you furnished probably fifteen or sixteen hundred dollars when he went away?
A. Yes, sir.
Q. How much was sent him after he went away, if any?
A. Several hundred dollars.
Q. About how many?
A. I don't know. I can't tell without looking at my books.
Q. About how many?
A. One thousand or so.
Q. You mean by "thousand or so" two or three thousand? You have an idea what this land cost, have you not?
A. Yes; pretty near.
Q. Well, state pretty near.
A. Well, there was three or four thousand.
Q. Which, three or four?
A. Three.
Q. No more than three?
A. No; I guess not.
Q. You say you have been somewhat in the real-estate business on the bay?
A. Yes, sir.
Q. You have a general idea of the value of property here?
A. Yes, sir.
Q. About how much was this wife's half of the Jones donation claim worth at the time that that purchase was made—how much was it worth?

Mr. BLACK: We object, your honor.

188 Q. What was that land claim worth at that time?
A. With a good title, one hundred and fifty dollars an acre.
Q. One hundred and fifty dollars an acre?
A. With a good title, but no other way.
Q. Did you furnish all the money that went to Mr. Black for this?
A. Yes, sir.
Q. Anybody else got interest?
A. I have no partner whatever.
Q. From whom did you first learn the whereabouts of the people from whom you procured these deeds?
A. Thomas York.
Q. When did you learn that?
A. I don't recollect the year I went to see him.
Q. Went to see him about this matter with a view of getting hold of this land claim?
A. I went to see him about matters pertaining to that claim.

Mr. LEAMING: We would like the record to show that we at this time state that when Mr. Black was on the witness stand he declined to disclose any relationship between himself and client with reference to compensation he was to receive for services performed in this case, because such matters were confidential matters between himself and his client. The witness, however, is the defendant in the case, and we will now allow the counsel to inquire of defendant what his agreements are with counsel for compensation for services
189 which are to be and which have been rendered by us in this case, and offer counsel utmost latitude. If the witness is willing to disclose them we have no objections.

Mr. THOMPSON: If the court please, we do not choose to go into the examination of that matter with this witness. I asked Mr. Black those questions for the purpose of which it is not prudent to permit the same testimony coming from the mouth of this witness that came from Mr. Black.

Witness excused.

Mr. Black recalls witness to the stand and asks:

Q. Who is in possession of the east half of the Betsy Jones donation claim, Mr. Dibble?
A. I am.
Q. When did you take possession; was it prior to the first day of December last?
A. Yes, sir.

Mr. THOMPSON:

Q. How are you in possession, living on it?
A. I platted it and put the plat on file.

Mr. BLACK:

Q. Have the surveyor place the stakes?
A. Yes, sir.

Witness excused.

Mr. BLACK: I would like to offer two exhibits, they being
190 certified copies of, I think, mortgages (the numbers I don't know) from the auditor's office, and like the same marked Exhibits "11" and "12" on the part of the defendant, the purpose of the exhibits being to contradict the testimony of the witness Eldridge, in that he testified that Betsy Jones was unable to write, when in fact the exhibits shows that at the time she signed her name and her husband signed his mark ——

Mr. THOMPSON: We object as utterly incompetent and immaterial because there is no proof whatever that they were executed by Betsy Jones, they being mere copies.

COURT: I will let this go in among the offered exhibits. I will sustain the objection and give exception.

Defendant rests. Plaintiff rests also.

Mr. THOMPSON: We request the stenographer to make copy of the testimony in triplicate and stipulate that the testimony shall go in as costs in the case, one copy being designed for the records of the court and one for the use of the attorneys on each side, each attorney paying half. Of course the stenographer will not have to wait for her pay.

191 PLAINTIFF'S EXHIBIT "A."

United States
to
Thomas Jones & wife. } Patent # 289.

THE UNITED STATES OF AMERICA:

To all to whom these presents shall come, Greeting:

Whereas there has been deposited in the General Land Office of the United States a certificate numbered four hundred and twenty-four of the register and receiver at Olympia, Washington Territory, whereby it appears that under the provisions of the act of Congress approved the 27th day of September, 1850, entitled "An act to create the office of surveyor general of the public lands in Oregon and to provide for the survey and to make donations to settlers of the public lands," and the legislation supplemental thereto, the claim of Thomas Jones and his wife, Betsy Jones, of Whatcom county, Washington Territory, notification No. 1525, has been established to a donation of one half section, or three hundred and twenty acres, of land, and that the same has been surveyed and designated as claim number forty-two, being parts of sections thirty-one and thirty-two, in township thirty-eight north, of range three east, according to the official plat of survey returned to the General Land Office by the surveyor general, being bounded and described as follows, to wit:

Beginning at a point thirty-six chains and twenty-three links
192 east of the northwest corner of said section thirty-two and running thence west twenty-three chains and forty-three links, thence south nine chains and thirty links, thence west forty

chains and twenty-two links, thence south two chains and seven links, thence west twenty chains and fifty links, thence south thirty-four chains and twenty links, thence east eighty-three chains and ninety links, and thence north forty-five chains and thirty links to the place of beginning in the district of lands subject to sale at Olympia, Washington Territory, containing three hundred and twenty-one acres and thirty-five hundredths of an acre:

Now know ye that the United States of America, in consideration of the premises and in conformity with the provisions of the act aforesaid, have given and granted, and by these presents do give and grant, unto the said Thomas Jones and to his heirs the west half and unto his wife, the said Betsy Jones, and to her heirs the east half of the tract of land above described:

To have and to hold the said tract, with the appurtenances, unto the said Thomas Jones and his wife, Betsy Jones, and to their heirs and assigns forever, their respective portions as aforesaid.

In testimony whereof I, Ulysses S. Grant, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, this sixth day of September, in the year of our Lord one thousand eight
193 hundred and seventy-one, and of the Independence of the United States the ninety-sixth.

By the President:

[L. S.]

U. S. GRANT,
By J. PARRISH, *Secretary.*

Recorded, vol. 3, page 89.

C. B. BOYNTON,
Recorder of the General Land Office.

D. W. H. W.

194 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, W. D. S.
WASHINGTON, D. C., *March* 8, 1884.

I, L. Harrison, acting Commissioner of the General Land Office, do hereby certify that the annexed copy of a patent dated the sixth day of September, one thousand eight hundred and seventy-one, issued in favor of Thomas Jones and wife, is a true and literal exemplification of the original patent, issued as aforesaid, as the same appears of record in this office, being for land surveyed as claim number forty-two, in township thirty-eight north, of range three east, in Washington Territory.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal General Land Office, United States.]

L. HARRISON,
Acting Commissioner of General Land Office.

Filed for record, at request of E. Eldridge, at 2 p. m., March 29th, 1884, and recorded and record compared & corrected April 11th, 1884.

C. DONOVAN,
Auditor & Recorder of Whatcom County, W. T.

195 STATE OF WASHINGTON, } ss:
County of Whatcom, }

I, E. L. Collier, county auditor and *ex officio* recorder of deeds in and for Whatcom county, State of Washington, hereby certify that the annexed and foregoing is a true copy of patent from United States to Thomas Jones *et ux.* as the same appears of record on page 93 of volume 5 of Deed Records of said county.

Witness my hand and official seal this fourteenth day of December, A. D. 1891.

[SEAL.] E. L. COLLIER,
County Auditor in and for Whatcom County,
State of Washington.

196 PLAINTIFF'S EXHIBIT "B."

Thomas Jones and wife to E. Eldridge. } Deed.

This indenture made and entered into on this 28th day of March, in the year of our Lord one thousand eight hundred and sixty-two, in the town of Schome, county of Whatcom, and Territory of Washington, betwixt Thomas Jones and Betsy Jones, his wife, of the said town, of the first part and Edward Eldridge of the second part,

Witnesseth: That the said Thomas and Betsy Jones, of the first part, for and in consideration of the sum of three hundred dollars, lawful money of the United States of America to them in hand paid, the receipt whereof is hereby acknowledged, hath bargained, granted and sold, and by these presents doth bargain, grant and sell, convey, and confirm unto the said Edward Eldridge of the second part, and to his heirs, executors, administrators and assigns, all and singular that certain piece or parcel of land situated, lying and being on the north side of Bellingham bay, known as Jones claim, and more particularly described as follows:—

Commencing at a stake on the line between section- 29 & 32 in township 38, north range 3 east, the same being 12.80 chains east of post corner to sections 29 and 30, 31 & 32, thence running east 23.20 chains to another stake in a mound of stone, thence south
45.30 chains to a post, thence west 84 chains (crossing) the
197 line between sections 31 & 32 at a distance of 36 chains intersecting said section line at 5.45 chains south of the qur. sec. corner to another post, thence N. 34.20 chains to another post on the south line of E. C. Fitzhugh claim, thence east along said

line 20.50 chains to the southeast corner of E. C. Fitzhugh claim, thence north 2.07 chains to the S. W. corner of Wm. Utter's claim to another post, thence with the south line of said Wm. Utter's claim 40.27 chains, crossing the section line between sections 31 & 32 at 27.47 chains, 9.34 chains south of the post corner to sec. 29, 30, 31 & 32 to the post at the S. E. corner to said Utter's claim, thence north 9.30 chains to the place of beginning, containing 320 acres, more or less, together with all the tenements, hereditaments, and appurtenances thereunto belonging, and all the rents, profits and issues, reversions and remainders, together with the estate, title and interest of the said Thomas and Betsy Jones to the said premises, or any part thereof, forever.

In testimony whereof, we have hereunto set our hands and seals this day above written.

THOMAS his x mark. JONES. [SEAL.]

BETSY JONES, [SEAL.]

By her attorney-in-fact, THOMAS his x mark. JONES.

Signed, sealed, and delivered in presence of—

WILLIAM SMITH.
H. C. BARKHOUSEN.

198 *Acknowledgement to Foregoing Deed.*

TERRITORY OF WASHINGTON, } ss:
County of Whatcom, }

Personally appeared before me, auditor in and for Whatcom county, Thomas Jones, to me well known to be the person who executed the foregoing deed, and acknowledged the execution thereof to be his own free act and deed for the uses and purposes therein specified, and likewise produced a power of attorney from Betsy Jones, his wife (at present a non-resident of this Territory), authorizing him to sell and convey her real estate, and stated that in accordance therewith he had executed the foregoing deed in her behalf for the uses and purposes therein specified.

Given under my hand and seal this 28th day of March, A. D. 1862.

H. C. BARKHOUSEN,
Auditor in and for Whatcom County.

Filed for record March 28th, 1862.
Recorded Aprile 4th, 1862.

H. C. BARKHOUSEN, *Recorder.*

199 STATE OF WASHINGTON, } ss:
County of Whatcom, }

I, E. L. Collier, county auditor and *ex officio* recorder of deeds in and for Whatcom county, State of Washington, hereby certify that the annexed and foregoing is a true copy of deed from Thomas Jones *et ux.* to Edward Eldridge as the same appears of record on page 27 of volume "G" of Deed Record of said county.

Witness my hand and official seal this fourteenth day of January, A. D. 1892.

[SEAL.] E. L. COLLIER,
County Auditor in and for Whatcom County,
State of Washington.

200 PLAINTIFF'S EXHIBIT "C."

Edward Eldridge & wife } Deed. Filed for Record May 28, A. D.
— } 1872, at 8 a. m.
Erastus Bartlett. }

This indenture made and entered into on the 24th day of May, A. D. 1872, between Edward Eldridge and Teresa Eldridge his wife, of the first part, and Erastus Bartlett of the second part,

Witnesseth: That the said parties of the first part, for and in consideration of the sum of one thousand dollars, lawful money of the United States, to them in hand paid, the receipt whereof is hereby acknowledged, have bargained, granted and sold, and by these presents do bargain, grant and sell unto the said party of the second part and to his heirs forever, the undivided one-half of that certain tract of land known as the Jones donation claim, situate, lying and being near the town of Sehome, and more particularly described as follows; beginning at a point thirty-six chains and twenty-three links east of the northwest corner of section thirty-two in township thirty-eight, north of range three east of the Willamette meridian, and running thence west twenty-three chains and
201 forty-three links, thence south nine chains and thirty links, thence west forty chains and twenty-two links, thence south two chains and seven links, thence west twenty chains and fifty links, thence south thirty-four chains and twenty links, thence east eighty-three chains and ninety links, and thence north forty-five chains and thirty links to the place of beginning, containing three hundred and twenty-one acres and thirty-five hundredths of an acre.

To have and to hold the above-described premises, with the appurtenances unto the said party of the second part, and to his heirs and assigns forever.

And we, the said parties of the first part, our heirs, executors and administrators, do hereby covenant to and with the said party of the second part, his heirs and assigns, that we are well seized of the said premises in fee-simple, *they* they are free from all encumbrances

and that we will warrant and defend the same against all lawful claims whatsoever.

In testimony whereof we have hereunto set our hands and affixed our seals this day and year above written.

EDWARD ELDRIDGE. [ ]
TERESA L. ELDRIDGE. [ ]

Witness-:
JOHN MUNROE.
GEORGE A. KELLOGG.

[U. S. Rev. St., 100, cancelled. E. Eldridge and T. E. E.]

202 TERRITORY OF WASHINGTON, }
County of Whatcom. }

Be it remembered that on this 28th day of May, A. D. 1872, before me, a notary public in and for said county and Territory, personally appeared Edward Eldridge and Teresa Eldridge, his wife, the parties who executed the foregoing deed, and acknowledged that they executed the same freely and voluntarily for the purposes therein specified, and after examining the said Teresa Eldridge separate and apart from her husband and informing her of the contents of said deed she acknowledged that she executed the same of her own free will and without the fear of or coercion from her husband.

In testimony whereof I hereunto set my hand and affix my official seal this — and year above written.

[NOTARIAL SEAL.] GEORGE A. KELLOGG,
Notary Public in and for W. T.

203 STATE OF WASHINGTON, }
County of Whatcom, } *ss:*

I, E. L. Collier, county auditor and *ex officio* recorder of deeds in and for Whatcom county, State of Washington, hereby certify that the annexed and foregoing is a true copy of deed from Edward Eldridge *et ux.* to Erastus Bartlett as the same appears of record on page 195 of volume "K" of Deeds Records of said county.

Witness my hand and official seal this fourteenth day of January, A. D. 1892.

[SEAL.] E. L. COLLIER,
County Auditor in and for Whatcom County,
State of Washington.

204 PLAINTIFF'S EXHIBIT "D."

E. & T. Eldridge to E. Bartlett. } Deed. Filed for Record May 27, at 8 p. m., A. D. 1878.

This indenture, made the twentieth day of May, A. D. 1878, between Edward Eldridge and Teresa Eldridge, his wife, parties of the first part, and Erastus Bartlett, party of the second part,

Witnesseth: That the parties of the first part, for and in consideration of the sum of two hundred dollars, lawful money of the United States of America, to them in hand paid, the receipt whereof is hereby acknowledged, have bargained, granted and sold, conveyed and confirmed, and by these presents do bargain, grant and sell, convey and confirm unto the said party of the second —, and to his heirs forever, the undivided one-half of that certain piece or parcel of land situate, lying and being in the county of Whatcom, Territory of Washington, known as the Jones donation land claim, and more particularly described as follows: Beginning at a point thirty-six chains and twenty-three links east of the northwest corner of section thirty-two in township thirty-eight, north of range three east, of the Willamette meridian, and running thence west twenty-three
205 chains and forty-three links, thence south nine chains and thirty links, thence west forty chains and twenty-two links, thence south two chains and seven links, thence west twenty chains and fifty links, thence south thirty-four chains and twenty links, thence east eighty-three chains and ninety links, and thence north forty-five chains and thirty links to the place of beginning, containing three hundred and twenty-one acres and thirty-five hundredths of an acre.

To have and to hold the above-described premises, with the appurtenances, unto the said party of the second part, and to his heirs and assigns forever. And the said parties of the first part, their heirs, executors, and administrators do by these presents covenant, grant and agree to and with the said party of the second part, his heirs and assigns, that they, the said parties of the first part, their heirs, executors and administrators, all and singular the premises hereinbefore conveyed, described and granted, with the appurtenances, unto the said party of the second part, his heirs and assigns and against all and every person or persons whomsoever lawfully claiming or to claim the same, or any part thereof, shall and will warrant and forever defend.

Witness our hands and seals this day and year first above written.

EDWARD ELDRIDGE. [L. S.]
TERESA L. ELDRIDGE. [SEAL.]

Witnesses:
M. D. SMITH.
A. E. SMITH.

206 TERRITORY OF WASHINGTON, } ss:
County of Wathcom, }

Be it remembered that on the 25th day of May, 1878, before me, auditor of Whatcom county, personally appeared Edward Eldridge and Terresa Eldridge, his wife, who acknowledged that they executed the foregoing deed of their own free will for purposes therein set forth, and after examining the said Teresa Eldridge separate and apart from her husband and informing her of the contents of this deed she acknowledged that she executed the same freely and voluntarily and without any fear of or coercion from her husband.

In testimony whereof I have hereunto set my hand and affixed my official seal this day and year above written.

M. D. SMITH,

[AUDITOR'S SEAL.] *Auditor Whatcom County, Wash. Terr'y.*

I certify that the above is a true copy of deed.

M. D. SMITH,

Auditor Whatcom Co., W. T.

207 STATE OF WASHINGTON, } ss:
County of Whatcom, }

I, E. L. Collier, county auditor and *ex officio* recorder of deeds in and for Whatcom county, State of Washington, hereby certify that the annexed and foregoing is a true copy of deed from Edward Eldridge *et ux.* to Erastus Bartlett as the same appears of record on page 464 of volume "O" of Deed Records of said county.

Witness my hand and official seal this fourteenth day of January, A. D. 1892.

E. L. COLLIER,

[SEAL.] *County Auditor in and for Whatcom County, State of Washington.*

208 PLAINTIFF'S EXHIBIT "E."

Erastus Bartlett to Edward Eldridge. } Deed. # 546.

This indenture made and entered into on the 13th day of August, A. D. 1883, between Erastus Bartlett of the city of San Francisco, State of California, party of the first part, and Edward Eldridge of the county of Whatcom, Territory of Washington, party of the second part,

Witnesseth: That the party of the first part, for and in consideration of the sum of five hundred dollars, lawful money of the United States, to him in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, does by these presents bargain, grant and sell, convey and confirm unto the party of the second part, and to his heirs forever, one undivided one-fourth of that tract of land situate in the county of Whatcom, Territory of Washington, known as the Thomas Jones donation claim, and described as follows: Commencing at a stake on the line between sections 29 & 32 in township 38, north of range 3 east, the same being

12.80 chains east of post corner to sections 29, 30, 31 & 32,

209 thence running east 23.20 chains to another stake, in a mound of stone, thence south 45.30 chains to a post, thence west 84 chains (crossing the line between sections 31 & 32 at a distance of 36 chains, intersecting said section line at 5.45 chains south of the quarter-section corner) to another post, thence north 34.20 chains to another post on the south line of E. C. Fitzhugh's claim, thence east along said line 20.50 chains to the S. E. corner of E. C. Fitz-

hugh's claim, thence north 2.07 chains to the S. W. corner of Wm. Utter's claim, to another post, thence along the south line of said Wm. Utter's claim 40.27 chains (crossing the section line between sections 31 & 32 at 27.47 chains 9.34 chains south of the corner post of sections 29, 30, 31 & 32) to the post at the S. E. corner to said Utter's claim, thence north 9.30 chains to the place of beginning, containing 320 acres, more or less, together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

To have and to hold the undivided one-fourth of the above-described premises, with the appurtenances unto the party of the second part, and to his heirs forever.

In witness whereof the party of the first part doth hereunto affix his name and seal this day and year above written.

ERASTUS BARTLETT. [SEAL.]

Witness-:
ALEX. W. ATKINS.
IDA A. ATKINS.

TERRITORY OF WASHINGTON, }
County of Whatcom. }

Be it remembered that on the 13th day of August, A. D.
210 1883, before me, a notary public in and for the county of Whatcom, personally appeared Erastus Bartlett, the person who executed the foregoing deed, and acknowledged that he executed the same of his own free will for purposes therein set forth.

In witness whereof I hereunto set my hand and official seal this day and year above written.

[A. W. Atkins, Notary Public, Wash. Ter.]

ALEX. W. ATKINS,
Notary Public for Washington Territory.

Filed for record, at request of E. Eldridge, August 18th, at 5 p. m., 1883, and recorded and record compared and corrected August 20, 1883.

C. DONOVAN,
Auditor and Recorder Whatcom County, W. T.

211 STATE OF WASHINGTON, }
County of Whatcom, } *ss:*

I, E. L. Collier, county auditor and *ex officio* recorder of deeds in and for Whatcom county, State of Washington, hereby certify that the annexed and foregoing is a true copy of deed — Erastus Bartlett to Edward Eldridge as the same appears of record on page 98 of volume 4 of Deed Records of said county.

Witness my hand and official seal this fourteenth day of January, A. D. 1892.

E. L. COLLIER,
[SEAL.] *County Auditor in and for Whatcom County, State of Washington.*

212 PLAINTIFF'S EXHIBIT "F."

E. Bartlett and wife to Hugh Eldridge. } Quitclaim Deed. #110.

This indenture, made the twentieth day of May, A. D. 1878 between Erastus Bartlett and Helen L. Bartlett, his wife, parties of the first part, and Hugh Eldridge, party of the second part,

Witnesseth: That the said parties of the first part, for and in consideration of the sum of five dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents remise, release and forever quitclaim unto the said party of the second part, and to his heirs and assigns, all that certain piece of land, to wit: One square acre in the northwest corner of the Jones donation land claim, lying near the town of Sehome, in the county of Whatcom, Territory of Washington.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, and to his heirs and assigns forever.

Witness our hands and seals.

213 ERASTUS BARTLETT. [SEAL.]
HELEN L. BARTLETT. [SEAL.]

L. W. HOWES.
CHAS. STEERE.
To E. B. and H. L. B.

COMMONWEALTH OF MASSACHUSETTS, *County of Suffolk*, } *ss:*

Be it remembered that on the second day of July, A. D. 1878, before me, a notary public of said county, personally appeared Erastus Bartlett and Helen L. Bartlett, his wife, & acknowledged that they executed the foregoing deed of their own free will & for the purposes therein set forth, and after examining the said Helen L. Bartlett separate and apart from her husband & informing her of the contents of this deed she acknowledged that she executed the same freely & voluntarily and without any fear of or coercion from her husband.

In testimony whereof I hereunto set my hand and affix my official seal the day and year above written.

[Chas. Steere, Notary Public, Mass.]

CHAS. STEERE,
Notary Public.

Filed for record, at the request of E. Eldridge, at 10 a. m., Jan. 29th, 1884. Recorded and record compared and corrected Jan. 29th, 1884.

C. DONOVAN,
Auditor and Recorder of Whatcom County, W. T.

214 STATE OF WASHINGTON, } ss:
County of Whatcom, }

I, E. L. Collier, county auditor and *ex officio* recorder of deeds in and for Whatcom county, State of Washington, hereby certify that the annexed and foregoing is a true copy of deed from Erastus Bartlett *et ux.* to Hugh Eldridge as the same appears of record on page 771 of volume 3 of Deed Records of said county.

Witness my hand and official seal this fourteenth day of January, A. D. 1892.

E. L. COLLIER,
[SEAL.] *County Auditor in and for Whatcom County, State of Washington.*

215 PLAINTIFF'S EXHIBIT "G."

Erastus Bartlett to E. Eldridge. } No. 1305. Power of Attorney.

Know all men that I, Erastus Bartlett, of San Francisco, State of California, do hereby constitute and appoint Edward Eldridge, of Whatcom, in the county of Whatcom and Territory of Washington, my true & lawful attorney, for me and in my name, place, and stead to bargain for, sell, and convey all my right, title, and interest in and to any or all portions or lots in a certain tract of land, or all of the same, called the "Jones tract," situated in said county of Whatcom, and described as section thirty-two (32), in township thirty-eight (38) north, range three (3) east (tract containing 321.35 acres, more or less), hereby ratifying & confirming whatever my said attorney may legally do by virtue hereof.

Witness my hand and seal this twenty-third day of August, A. D. 1888.

ERASTUS BARTLETT. [ ]

Witnesses:
GEORGE GOODMAN.
J. A. JOHNSON.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

On this twenty-third (23) day of August, A. D. one thousand eight hundred and eighty-eight, before me, Holland Smith,
216 a commissioner of deeds for the Territory of Washington, at the city and county of San Francisco, State of California, duly commissioned and sworn, personally came and appeared Erastus Bartlett, who is personally known to me to be the same Erastus

Bartlett whose name is subscribed to the within power of attorney as party thereto, and he duly acknowledged the execution of the said *said* power of attorney freely and voluntarily and for the uses and purposes therein mentioned and contained.

In witness whereof I have hereunto set my hand and affixed my official seal, at the said city and county of San Francisco, this 23rd day of August, 1888.

{ Holland Smith, a Commissioner of Deeds for Washington Territory, } { State of California, City and County of San Francisco. }

[SEAL.] HOLLAND SMITH,
A Commissioner of Deed- for the Territory of Washington, Residing at San Francisco, California.

Received for record at 6 p. m., September 7th, A. D. 1888, and recorded at the request of E. Eldridge.

HUGH ELDRIDGE,
County Auditor of Whatcom County, Washington Territory.

217 STATE OF WASHINGTON, } *ss:*
County of Whatcom, }

I, E. L. Collier, county auditor and *ex officio* recorder of deeds in and for Whatcom county, State of Washington, hereby certify that the annexed and foregoing is a true copy of power of attorney from Erastus Bartlett to Edward Eldridge as the same appears of record on page 317 of volume 1 of Power of Att'y Records of said county.

Witness my hand and official seal this fourteenth day of January, A. D. 1892.

[SEAL.] E. L. COLLIER,
County Auditor in and for Whatcom County, State of Washington.

218 PLAINTIFF'S EXHIBIT "H."

Teresa Eldridge to Edward Eldridge. } No. 2779. Power of Attorney.

Know all men by these presents that I hereby appoint and empower Edward Eldridge, my husband, as my true and lawful attorney, for me and in my name, place, and stead to sell, lease, or otherwise dispose of all my right, title, and interest in and to two certain tracts of land situate in Whatcom county, Washington Territory, and known as the Jones and Conner donation claim-, with full power to do all and every act necessary to be done in the premises as I could do if personally present, hereby ratifying and confirming all that my said attorney may lawfully do or cause to be done by virtue hereof.

Feb. 9th, A. D. 1889.

TERESA ELDRIDGE.

Witnesses:
A. M. PENCE.
HUGH ELDRIDGE.

TERRITORY OF WASHINGTON, } ss:
County of Whatcom, }

Be it remembered that on the 9th day of February, A. D. 1889, before me, the county auditor of Whatcom county, personally appeared Teresa Eldridge, the wife of Edward Eldridge, the person who executed the foregoing instrument, and acknowledged that she executed the same freely and voluntarily for the purposes
219 therein set forth, and upon being examined separate and apart from her husband and informed of the contents of this instrument she acknowledged that she executed the same of her own free will and without any fear of or coercion from her husband.

In witness whereof I have hereunto set my hand and affixed my official seal this day and year above written.

[Auditor's Seal, Whatcom County, W. T.]

HUGH ELDRIDGE,
Auditor of Whatcom County, W. T.

Received for record at 12 m., February 13th, A. D. 1889, and recorded at the request of E. Eldridge.

HUGH ELDRIDGE,
County Auditor of Whatcom County, Washington Territory.

STATE OF WASHINGTON, } ss:
County of Whatcom, }

I, E. L. Collier, county auditor and *ex officio* recorder of deeds in and for Whatcom county, State of Washington, hereby certify that the annexed and foregoing is a true copy of power of attorney from Teresa Eldridge to Edward Eldridge as the same appears of record on page 434 of volume 1 of Power of Att'y Records of said county.

Witness my hand and official seal this fourteenth day of January, A. D. 1892.

[SEAL.]

E. L. COLLIER,
County Auditor in and for Whatcom County, State of Washington.

220 PLAINTIFF'S EXHIBIT "I."

Erastus Bartlett *et al.* to York syndicate. } No. 3021. Quitclaim Deed.

This indenture, made the eighteenth day of February, in the year of our Lord one thousand eight hundred and eighty-nine, between Erastus Bartlett of San Francisco, California, by Edward Eldridge of Whatcom county, Wash. Ter., his attorney-in-fact, and Edward Eldridge and Teresa Eldridge, his wife, of Whatcom county, Wash. Ter., the parties of the first part, and Carmi Dibble and W. Finley Hall, for York syndicate and York addition to New Whatcom, Whatcom county, Wash. Ter., the parties of the second part,

Witnesseth: That the said parties of the first part, for and in consideration of the sum of three hundred (300) dollars, current money of the United States of America, to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, do by these presents demise, release and forever quitclaim unto the said parties of the second part, and to their heirs and assigns, all that certain lot, piece or parcel of land situate in the Territory of Washington, county of Whatcom, and bounded and particularly described as follows, to wit:

Commencing at the southeast corner of William Utter donation land claim, thence south twenty (20) feet, thence west to
221 the southwest corner of the William Utter donation land claim, thence east along the southern boundary of the said William Utter donation claim to the place of beginning, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To have and to hold all and singular the said premises, together with the appurtenances, unto the said parties of the second part, and to their heirs and assigns forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

EDWARD ELDRIDGE. [SEAL.]
TERESA ELDRIDGE, [SEAL.]
By her attorney-in-fact, EDWARD ELDRIDGE. [SEAL.]
ERASTUS BARTLETT, [SEAL.]
By his attorney-in-fact, EDWARD ELDRIDGE. [SEAL.]

Signed, sealed, and delivered in presence of—
ALEX. VAN WYCK.
H. E. WAITY.

222 TERRITORY OF WASHINGTON, } ss:
County of Whatcom, }

On this twenty-third day of February, A. D. 1889, before me, a notary public in and for Whatcom county, Washington Territory, personally came Edward Eldridge, in person, and Teresa Eldridge and Erastus Bartlett, by their attorney-in-fact, Edward Eldridge, to me known to be the individuals described in and who executed the within instrument, and acknowledged that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned; and the said Edward Eldridge further acknowledged that he signed the name of his principles as their free and voluntary act.

Witness my hand and official seal the day and year in this certificate first above written.

[E. H. Waity, Notary Public, Washington Territory.]

[SEAL.] H. E. WAITY,
Notary Public in and for Whatcom County and Washington Territory.

Received for record at 3 p. m., March 1st, A. D. 1889, and recorded at the request of Edmund Cosgrove.

HUGH ELDRIDGE,
County Auditor of Whatcom County, Washington Territory.

223 STATE OF WASHINGTON, } ss:
County of Whatcom, }

I, E. L. Collier, county auditor and *ex officio* recorder of deeds in and for Whatcom county, State of Washington, hereby certify that the annexed and foregoing is a true copy from deed from Edward Eldridge *et al.* — Carmi Dibble *et al.* as the same appears of record on page 566 of volume 8 of Deed Records of said county.

Witness my hand and official seal this fourteenth day of January, A. D. 1892.

[SEAL.] E. L. COLLIER,
County Auditor in and for Whatcom County, State of Washington.

224 PLAINTIFF'S EXHIBIT "J."

Warranty deed from Hugh Eldridge to Edward Eldridge and Erastus Bartlett. } Warranty Deed. No. 3479.

This indenture, made this 13th day of March, in the year of our Lord one thousand eight hundred and eighty-nine, between Hugh Eldridge (a bachelor) of Whatcom county, Washington Territory, the party of the first part, and Erastus Bartlett, of the city of San Francisco, State of California, and Edward Eldridge of the county of Whatcom, and Territory of Washington, the parties of the second part,

Witnesseth: That the said party of the first part, for and in consideration of the sum of one ($1.00) dollar, lawful money of the United States, and other valuable considerations, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey, and confirm unto the said parties of the second part, and to their heirs and assigns, the following-described tract, lot and parcel of land, situate, lying and being in the county of Whatcom, Territory of Washington, and particularly bounded and described as follows, to wit:

225 The undivided three-fourth- interest to Erastus Bartlett and the undivided one-fourth to Edward Eldridge of one square acre of land in the northwest corner of the Jones donation claim, near the town of Sehome, being the same property conveyed by quitclaim deed from Erastus Bartlett and Helen L. Bartlett, his wife, to the grantor herein, on the twentieth day of May, 1878, which said deed is of record in the auditor's office of Whatcom county, Wash. Terr., in volume (3) of Deeds, pages 771 and 772.

Together with the appurtenances, to have and to hold the said premises, with the appurtenances, unto said parties of the second part, and to their heirs and assigns forever.

And the said party of the first part, his heirs, executors and administrators, does by these presents covenant, grant and agree to and with the said parties of the second part, their heirs and assigns, that he, the said party of the first part, his heirs, executors and administrators, all and singular the premises hereinabove conveyed, described and granted, or mentioned, with the appurtenances, unto the said parties of the second part, their heirs and assigns, and against all and every person and persons whomsoever lawfully claiming or to claim the same, or any part thereof, shall and will warrant and forever defend.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

HUGH ELDRIDGE. [SEAL.]

Signed, sealed, and delivered in presence of—
C. T. CANFIELD.
J. P. DE MATTOS.

226 TERRITORY OF WASHINGTON, } ss:
County of Whatcom, }

On this 13th day of March, A. D. 1889, before me, the undersigned, James P. De Mattos, a notary public in and for said county, personally came Hugh Eldridge (who declared himself to be a bachelor), to me known to be the individual described in and who executed the within instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate first above written.

[James P. De Mattos, Notary Public, Washington Territory.]

JAMES P. DE MATTOS,
Notary Public in and for Washington Territory.

Received for record at 8 a. m., April 2nd, A. D. 1889, and recorded at the request of Edward Eldridge.

HUGH ELDRIDGE,
County Auditor of Whatcom County, Washington Territory.

227 STATE OF WASHINGTON, } ss:
County of Whatcom, }

I, E. L. Collier, county auditor and *ex officio* recorder of deeds in and for Whatcom county, State of Washington, hereby certify that the annexed and foregoing is a true copy of deed from Hugh Eldridge to Erastus Bartlett and Edward Eldridge as the same appears of record on page 246 of volume 10 of Deed Records of said county.

Witness my hand and official seal this fourteenth day of January, A. D. 1892.

[SEAL.]

E. L. COLLIER,
County Auditor in and for Whatcom County, State of Washington.

228 PLAINTIFF'S EXHIBIT "L."

Teresa Eldridge to Edward Eldridge. } No. 3614. Power of Attorney.

Know all men by these presents that I hereby appoint and empower Edward Eldridge, my husband, as my true and lawful attorney, for me and in my name, place, and stead to lease, sell, or otherwise dispose of all my right, title, and interest in and to any lands in Whatcom county in which Erastus Bartlett has an interest, giving and granting unto my said attorney full power to do all things necessary and requisite to be done in the premises as I could do if personally present, and I hereby ratify and confirm all that my said attorney may do or cause to be done in the premises by virtue hereof.

In witness whereof I here*by* set my hand and seal this second day of April, A. D. 1889.

TERESA ELDRIDGE. [SEAL.]

Witnesses:
HUGH ELDRIDGE.
A. M. PENCE.

TERRITORY OF WASHINGTON, } ss:
County of Whatcom, }

Be it remembered that on this 2nd day of April, A. D. 1889,
229 before me, county auditor of Whatcom county, personally appeared Teresa Eldridge, wife of Edward Eldridge, the person who executed the foregoing instrument, and acknowledged to me separate and apart from her husband that she signed and sealed the same of her own free will and without fear or coercion from any one for the purposes therein set forth.

In witness whereof I hereunto set my hand and official seal this day above written.

[Auditor's Seal, Whatcom County, W. T.]

HUGH ELDRIDGE,
Auditor of Whatcom County, W. T.

Received for record at 11 a. m., April 11th, A. D. 1889, and recorded at the request of E. Eldridge.

HUGH ELDRIDGE,
County Auditor of Whatcom County, Washington Territory.

230 STATE OF WASHINGTON, } ss:
County of Whatcom, }

I, E. L. Collier, county auditor and *ex officio* recorder of deeds in and for Whatcom county, State of Washington, hereby certify that the annexed and foregoing is a true copy of power of attorney from Teresa Eldridge to Edward Eldridge as the same appears of record on page 538 of volume 1 of Power of Att'y Records of said county.

Witness my hand and official seal this fourteenth day of January, A. D. 1892.

E. L. COLLIER,
[SEAL.] *County Auditor in and for Whatcom County, State of Washington.*

231 PLAINTIFF'S EXHIBIT "M."

Erastus Bartlett *et al.* to The Bellingham Bay Land Co. } No. 4896. Deed.

This indenture, made this sixteenth day of May, A. D. 1890, by and between Erastus Bartlett and unmarried man and Edward Eldridge and Teresa Eldridge, his wife, acting by and through her attorney-in-fact, Edward Eldridge, the parties of the first part, and the Bellingham Bay Land Company, a private corporation duly incorporated and organized under the laws of the State of Washington, the party of the second part,

Witnesseth: That the parties of the first part, for and in consideration of the sum — one million (1,000,000) dollars, to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, convey, and confirm unto the party of the second part, and to its successors and assigns, the following-described tracts, lots and parcels of land, situate and being in the county of Whatcom, and in the State of Washington, more particularly described as follows, to wit:

First. The following-described lots, as the same appear upon the map and plats of the town of Bellingham, in the county of Whatcom and State of Washington, as the same appear on file and of record in the office of the auditor of the said county, the lots being situate upon what is known as the James Morrison
232 and W. R. Pattle donation land claims, and described as follows, to wit: Lot seven (7) in block nine (9); lots
E. H. H. seven and eight (7 & 8) in block number ten (10); lots eight and ten (8 & 10) in block number eleven (11); lots thirteen (13) fourteen (14) fifteen (15) sixteen (16) seventeen (17) eighteen (18) nineteen (19) twenty (20) twenty-one (21) and twenty-two (22) in block number twelve (12); lots eighteen (18) nineteen (19) twenty (20) twenty-one (21) twenty-two (22) twenty-three (23) and twenty-four (24) in block number thirteen (13) lots three (3) four (4) five (5) six (6) seven (7) eight (8) nine (9) ten (10) thirteen (13) fourteen (14) fifteen (15) seventeen (17) eighteen

(18) nineteen (19) twenty (20) twenty-one (21) twenty-two (22) twenty-three (23) and twenty-four (24) in block number seventeen (17); lots three (3) four (4) five (5) nine (9) ten (10) thirteen (13) fourteen (14) fifteen (15) sixteen (16) seventeen (17) eighteen (18) nineteen (19) twenty (20) twenty-one (21) twenty-two (22) twenty-three (23) and twenty-four — in block sixteen (16); all of block number eighteen (18) saving and excepting lot number two (2) thereof; lot ten (10) in block number nineteen (19); lot- seven (7) and eight (8) in block number twenty (20) lots numbered three (3) four (4) five (5) six (6) seven (7) eight (8) nine (9) ten (10) eleven (11) twelve (12) thirteen (13) fourteen (14) fifteen (15) sixteen (16) seventeen (17) eighteen (18) nineteen (19) and twenty (20) in block number twenty-five (25); lots three (3) four (4) five (5) six (6) seven (7) eight (8) nine (9) ten (10) thirteen (13) fourteen (14) fifteen (15) sixteen (16) seven-
233 teen (17) eighteen (18) nineteen (19) twenty (20) twenty-one (21) twenty-two — twenty-three — and twenty-four (24) in block number twenty-six (26); lots one (1) two (2) three (3) four (4) five (5) six (6) seven (7) thirteen (13) fourteen (14) fifteen (15) sixteen (16) seventeen (17) eighteen (18) nineteen (19) twenty (20) twenty-one (21) twenty-two (22) twenty-three (23) and twenty-four (24) in block number twenty-seven —; lots three (3) four (4) seven (7) eight (8) fifteen (15) sixteen (16) seventeen (17) eighteen (18) nineteen (19) twenty (20) twenty-one (21) twenty-three (23) and twenty-four (24) in block number twenty-eight (28); lots seven (7) and eight (8) in block number twenty-two (22); lots eight (8) and nine (9) in block number twenty-four (24); lots five (5) six (6) seven (7) eight (8) eleven (11) twelve (12) thirteen (13) fourteen (14) fifteen (15) sixteen (16) seventeen (17) in block number thirty (30); lots three (3) four (4) nine (9) ten (10) eleven (11) twelve (12) thirteen (13) fourteen (14) fifteen (15) sixteen (16) seventeen (17) eighteen (18) nineteen (19) twenty (20) twenty-one (21) twenty-two (22) twenty-three (23) and twenty-four (24) in block forty-eight (48); lots three (3) four (4) five (5) six (6) seven (7) eight (8) nine (9) and ten in block forty-nine (49); lots three (3) four (4) five (5) six (6) seven (7) in block fifty (50); lots two (2) four (4) five (5) six (6) seven (7) eight (8) nine (9) ten (10) eleven (11) twelve (12) thirteen (13) fourteen (14) nineteen (19) twenty (20) twenty-one (21) twenty-two (22) and twenty-three (23) in block fifty-one (51); lots three (3) four (4) five (5) six (6) and seven (7) in block seventy-six (76); all of block number seventy-seven (77); lots one (1) two (2) three (3)
234 four (4) five (5) six (6) seven (7) eight (8) nine (9) ten (10) eleven (11) and twelve (12) in block seventy-eight (78); lots seven (7) eight (8) nine (9) and ten (10) in block seventy-nine (79); lots one (1) two (2) three (3) and four (4) in block eighty (80); lot three (3) in block eighty-one (81); lot four — in block eighty-two (82); lots nine (9) ten (10) and eleven (11) in block eighty-three —; lots six (6) seven (7) and eight (8) in block twenty-one (21);

Second. All that portion of that certain donation claim known as the James Morrison donation claim, lying east of Fifth street, as the said Fifth street appears upon the recorded maps and plats of the town of Bellingham; also all of that certain donation land claim

known as the W. R. Pattle donation land claim, which
E. H. H. is not hereinbefore described by numbers of lots and blocks, except the Mill reserve, in the county of Whatcom and State of Washington; also the whole of that certain donation land claim known as the Thomas Jones donation land claim, containing three hundred and twenty-one (321) acres of land, a part of which is platted as an addition to the town of Sehome, it being the intention to convey the platted as well as the unplatted lands now owned by the parties of the first part in the said Thomas Jones donation land claim, to have and to hold the hereinbefore-described premises with all the appurtenances, rights and privileges thereunto belonging or in anywise appertaining, to the party of the second part, and to its successors and assigns forever.

In witness whereof the parties of the first part have hereunto set their hands and seals this 16th day of May, 1890.

235 ERASTUS BARTLETT. [s.]
EDWARD ELDRIDGE. [s.]
TERESA ELDRIDGE, [s.]
By her attorney-in-fact, EDWARD ELDRIDGE.

Signed, sealed, and delivered in presence of—
EDGAR H. HOLBROOK.
H. Y. THOMPSON.

STATE OF WASHINGTON, } ss:
County of Whatcom, }

This is to certify that on this sixteenth day of May, A. D. 1890, there personally appeared before the undersigned, Edgar H. Holbrook, a notary public in and for the State of Washington, duly commissioned and sworn, Erastus Bartlett, a single man; Edward Eldridge and Teresa Eldridge, his wife, by the said Edward Eldridge, her attorney-in-fact, to me known *to me* to be the individuals described in and who executed the foregoing deed, and acknowledged to me that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned, and the said Edward Eldridge, as attorney-in-fact of the said Teresa Eldridge, acknowledged to me that as such attorney-in-fact he executed the said deed as the free and voluntary act
E. H. H. and deed of the said Teresa Eldridge, his wife. Erastus Bartlett, being duly sworn, acknowledged that he is an unmarried man and desires that the same be so recorded.

Witness my hand and official seal the day and year in this certificate first above written.

{ Edgar H. Holbrook. Expiration of Commission, Jan. 12, 1894. }
{ Notary Public, State of Washington. }

EDGAR H. HOLBROOK,
Notary Public in and for the State of Washington, Fairhaven, Washington.

236 Received for record at 4 p. m., May 17, A. D. 1890, and recorded at the request of H. Y. Thompson.

HUGH ELDRIDGE,
County Auditor of Whatcom County, State of Washington.

STATE OF WASHINGTON, }
County of Whatcom, } ss:

I, E. L. Collier, county auditor and *ex officio* recorder of deed- in and for Whatcom county, State of Washington, hereby certify that the annexed and foregoing is a true copy of deed from Erastus Bartlett *et al.* to the Bellingham Bay Land Co. as the same appears of record on page 71 of volume 15 of Deed Records of said county.

Witness my hand and official seal this fourteenth day of January, A. D. 1892.

[SEAL.]

E. L. COLLIER,
County Auditor in and for Whatcom County, State of Washington.

(Here follows map marked page 237.)

238 PLAINTIFF'S EXHIBIT "N."

EXHIBIT "A."

Thomas Jones & wife to E. Eldridge. } Deed.

This indenture, made and enter-d into on this 28th day of March, in the year of our Lord one thousand eight hundred and sixty-two, in the town of Sehome, county of Whatcom, and Territory of Washington, betwixt Thomas Jones and Betsy Jones, his wife, of the said town of the first part, and Edward Eldridge of the second part,

Witnesseth: That the said Thomas and Betsy Jones of the first part, for and in consideration of the sum of three hundred dollars, lawful money of the United States of America, to them in hand paid, the receipt whereof is hereby acknowledged, hath bargained, granted and sold, and by these presents doth bargain, grant and sell, convey and confirm unto the said Edward Eldridge of the second part, and to his heirs, executors, administrators and assigns, all and singular that certain piece, or parcel of land situated, lying and being on the north side of Bellingham bay, known as Jones' claim, and more particularly described as follows: Commencing at a stake on the line between section- 29 & 32 in township 38 north range 3 east, the same being 12.80 chains east of post corner to section- 29 and 30, 31 & 32, thence running east 23.20 chains to another stake in a moun- of stone, thence south 45.30 chains to a post, thence west 84 chains (crossing) the line between sections 31 & 32 in a distance of 36 chains, intersecting said section

line at 5.45 chains south of the qu'r sec. corner to another
239 post, thence N. 34.20 chains to another post, on the south line of E. C. Fitzhugh claim, thence east along said line 20.50 chains to the southeast corner of E. C. Fitzhugh claim, thence N. 2.07 chains to the S. W. corner of Wm. Utter's claim to another post, thence with the south line of said Wm. Utter's claim 40.27 chains, crossing the section line between sections 31 & 32 at 27.47 chains, 9.34 chains south of the post corner to said Utter's claim, thence north 9.30 chains to the place of beginning, containing 320 acres, more or less, together with all the tenements, hereditaments and appurtenances thereunto belonging, and all the rents, profits and issues, reversions and remainders, together with the estate, title, and interest of the said Thomas and Betsy Jones to the said premises, or any part thereof, forever.

In testimony whereof we have hereunto set our hands and seals this day above written.

his
THOMAS x JONES. [SEAL.]
mark.
BETSY JONES, [SEAL.]
his
By her attorney-in-fact, THOMAS x JONES.
mark.

Signed, sealed, and delivered in presents of—
WILLIAM SMITH.
H. C. BARKHOUSEN.

Acknowledgement to Foregoing Deed.

TERRITORY OF WASHINGTON, }
County of Whatcom, } ss:

Personally appeared before me, auditor in and for Whatcom county, Thomas Jones, to me well known to be the person who executed the foregoing deed, and acknowledged the execution thereof to be his own free act and deed for the uses and purposes therein specified, and likewise produced a power of attorney from
240 Betsy Jones, his wife (at present a non-resident of this Territory), authorizing him to sell and convey her real estate, and stated that in accordance therewith he had executed the foregoing deed in her behalf for the uses and purposes therein specified.

Given under my hand and seal this 28th day of March, A. D. 1862.

H. C. BARKHOUSEN,
Auditor in and for Whatcom County.

Filed for record March 28th, 1862. Recorded April 4th, 1862.
H. C. BARKHOUSER, *Recorder.*

(Endorsed on back :)
Deed. Thomas Jones and wife to Edward Eldridge. Recorded in Book "G" of Deeds, page 27. Filed in clerk's office January 16th, 1889. W. E. Ledgerwood, clerk, by C. Donovan, dep. clerk.

241 In the District Court of the Third Judicial District, Washington Territory, Holding Terms at Whatcom, in and for Whatcom County.

In the Matter of the Application of EDWARD ELDRIDGE, ERASTUS BARTLETT, and HUGH ELDRIDGE to perpetuate the testimony of Edward Eldridge, Harriet Peterson, and H. C. Barkhousen in relation to the title, claim, and interest of applicants in and to the Jones donation claim, in said county.

To the Honorable Thomas Burke, chief justice of Washington Territory and judge of the above-entitled court:

Your petitioners, Edward Eldridge, Erastus Bartlett, and Hugh Eldridge, would respectfully represent to your honor:

I.

That on or about the 28th day of March, A. D. 1862, your petitioner Edward Eldridge did purchase from one Thomas Jones and Betsy Jones, his wife, for a valuable consideration, all and singular that certain piece or parcel of land situate, lying, and being on the north side of Bellingham bay, in said Whatcom county, known as the Jones donation claim and more particularly described as follows, to wit: Commencing at a stake on the line between sections 29 & 32, in township 38 north, range 3 east, the same being 12.80 chains east of post corner to sections 29 and 30, 31 & 32, thence running east 23.30 chains to another stake in a mound of stone, thence south 45.30 chs. to a post, thence
242 west 84 chains, crossing the line between secs. 31 & 32 at a distance of 36 chains, intersecting said section line at 5.45 chains south of the qr. section corner to another post; thence N. 34.20 chs. to another post on the south line of E. C. Fitzhugh's claim, thence east along said line 20.50 chains to the southeast corner of E. C. Fitzhugh's claim, thence north 2.07 chains to the S. W. corner of said Wm. Utter's claim to another post; thence with the south line of Wm. Utter's claim 40.27 chains, crossing the section line between secs. 31 & 32 at 27.47 chains, 9 34 chains south of the post corner to said Utter's claim; thence north 9.30 chains to the place of beginning, containing 320 acres, more or less.

II.

That said Betsy Jones did duly execute, acknowledge, and deliver unto your said petitioner, Edward Eldridge, said described deed by Thomas Jones, as her attorney-in-fact, which said deed is recorded in Book "G" of Deeds, page 27 of the records in the office of the auditor of said county, and a copy of which is hereunto annexed, marked Exhibit "A," and made a part hereof.

III.

That said Thomas Jones was thereunto duly authorized by said Betsy Jones by power of attorney, which said power of attorney

has never been recorded, and your petitioners have been unable, after diligent search, to find the same in the places where such power of attorney should be.

IV.

That said Betsy Jones departed this life in the year A. D. 1866, and the said Thomas Jones departed this life in the — A. D.
243 1872, and said Betsy Jones left no heirs to the knowledge of your petitioners.

V.

That said above-named witnesses, Edward Eldridge, Harriet Peterson, and H. C. Barkhousen, were cognizant of and well acquainted with said power of attorney from said Betsy Jones to said Thomas Jones and *ist* contents, and are the only living witnesses by which said material fact can be proven.

VI.

That said Edward Eldridge subsequently transferred certain interests in said described claim to said Erastus Bartlett and said Hugh Eldridge, who, with him, are now the owners thereof.

VII.

That said witnesses are all of great age, to wit, each over the age of sixty years, and at any time liable to meet the inexorable laws of nature.

Wherefore your petitioners pray that your honor allow the examination of said witnesses, Edward Eldridge, Harriet Peterson, and H. C. Barkhousen, for the purpose of perpetuating their testimony in regard to the said power of attorney from Betsy Jones to Thomas Jones and its loss and contents, and appoint a commissioner to take the same, and a time and place for hearing such application, as by the statute in such cases made and provided, and that notice of said time and place be ordered issued and published to the unknown heirs of Betsy Jones, deceased.

JAMES P. DE MATTOS,
Att'y for Petitioners.

244 TERRITORY OF WASHINGTON, } ss:
County of Whatcom, }

Hugh Eldridge, being first duly sworn, saith that he is one of the petitioners above named and makes this affidavit on behalf of himself and his copetitioners; that he has read the above petition, knows the contents thereof, and that the same are true.

HUGH ELDRIDGE.

Subscribed and sworn to before me this 16th day of January, A. D. 1889.

JAMES P. DE MATTOS,
Notary Public.

(Endorsed on back:)
No. 269. Edward Eldridge *et al. v.* Unknown Heirs of Betsy Jones, dec'd. Petition to perpetuate testimony. Filed in clerk's office January 16th, 1889. W. E. Ledgerwood, cler-, by C. Donovan, deputy cler-. J. P. De Mattos, att'y for petitioners.

245 In the District Court of the Third Judicial District, Washington Territory, Holding Terms at Whatcom in and for Whatcom County.

In the Matter of the Application of EDWARD ELDRIDGE, Erastus Bartlett, and Hugh Eldridge to Perpetuate the Testimony of Edward Eldridge, Harriet Peterson, and H. C. Barkhousen in Relation to Title, Claim, and Interest of Applicants in and to the Jones Donation Claim, in said County,
vs.
THE UNKNOWN HEIRS OF BETSY JONES, Deceased. } Order.

The statement of Edward Eldridge, Erastus Bartlett, and Hugh Eldridge setting forth that petitioners are the owners of the Jones donation claim, in said county, and that their title is derived through Thomas Jones and Betsy Jones, the said Betsy Jones executing and acknowledging said deed by Thomas Jones, her attorney-in-fact; that said power of attorney has never been filed for record in the office of the auditor of said county and cannot be found, and that Edward Eldridge, Harriet Peterson, and H. C. Barkhousen are the only living witnesses to the execution and existence of above-described power of attorney, and that it is desirous that their testimony be perpetuated in reference to the same, and it further appearing that the said Betsy Jones departed this life without leaving heirs to the knowledge of petitioners:

Now, therefore, it is ordered, on motion of J. P. De Mat-
246 tos, Esq., attorney for petitioners, that the 13th day of April, A. D. 1889, at ten o'clock in the forenoon of that day, and at the court-room, at Seattle, Wash. Terr'y, be, and the same is hereby, appointed the time and place for hearing such application and notice thereof, and *of* the statement be served on all persons mentioned therein as adversely interested in the matter, on all those living within the Territory at least twenty days before the time for hearing such application and upon those who are not residents by publication or otherwise in the same manner as a notice is served upon a non-resident, as is provided by law.

Dated at Seattle, W. T., Feb'y 1, 1889.

THOMAS BURKE, *Judge.*

(Endorsed on back:)
No. 269. Edward Eldridge *et al. v.* Unknown Heirs of Betsy Jones, deceased. Order. Filed in clerk's office and entered February 7th, 1889. W. E. Ledgerwood, clerk, by C. Donovan, deputy clerk.

247 *Order of Court.*

In the District Court of the Third Judicial District, Washington Territory, Holding Terms at Whatcom in and for Whatcom County.

In the Matter of the Application of EDWARD ELDRIDGE, ERASTUS Bartlett, and Hugh Eldridge to Perpetuate the Testimony of Edward Eldridge, Harriet Peterson, and H. C. Barkhousen in Relation to the Title, Claim, and Interest of Applicants in and to the Jones Donation Claim, in said County,

vs.

THE UNKNOWN HEIRS OF BETSY JONES, Deceased.

The statement of Edward Eldridge, Erastus Bartlett, and Hugh Eldridge, setting forth that the petitioners are the owners of the Jones donation claim, in said county, and that their title is derived through Thomas Jones and Betsy Jones, the said Betsy Jones executing and acknowledging the said deed by Thomas Jones, her attorney-in-fact; that said power of attorney has never been filed for record in the office of the auditor of said county and cannot be found, and that Edward Eldridge, Harriet Peterson, and H. C. Barkhousen are the only living witnesses to the execution and existence of the above-described power of attorney, and that it is desirous that their testimony be perpetuated in reference to the same; and it further appearing that said Betsy Jones departed this life without leaving heirs to the knowledge of petitioners:

248 Now, therefore, it is ordered, on motion of J. P. De Mattos Esq., attorney for petitioners, that the 13th day of April, A. D. 1889, at ten o'clock of the forenoon of that day, at the court-room, at Seattle, Wash. Terr'y, be, and the same is hereby, appointed the time and place for hearing such application, and notice thereof and of the statement be served on all persons mentioned therein as adversely interested in the matter, on all those living within the Territory at least twenty days before the time of hearing such application and upon those who are not residents by publication or otherwise in the same manner as a notice is served upon a non-resident, as provided by law.

Dated at Seattle, W. T., February, 1, 1889.

THOMAS BURKE, *Judge.*

Now, therefore, the unknown heirs of Betsy Jones, deceased, and all persons having or claiming any interest adverse to applicants in the Jones donation claim are notified to be and appear at the time and place specified in said order and show cause, if any they have, why an order should not be made allowing the examination of the said witnesses, or their default will be entered and the prayer of said statement granted.

Witness my hand and the seal of the said court this 7th day of February, A. D. 1889.

[SEAL.] W. E. LEDGERWOOD, *Clerk*,
By C. DONOVAN, *Deputy Clerk*.

JAMES P. DE MATTOS, *Attorney*.

Date of first publication, Feb. 8, 1889.

249 *Affidavit of Publication.*

TERRITORY OF WASHINGTON, } ss:
County of Whatcom, }

T. G. Nicklin, being duly sworn, says that he is publisher of the Whatcom Reveille, a weekly newspaper printed and published at Whatcom, in Whatcom county, Washington Territory, and that said newspaper during all the times herein mentioned is and was a newspaper published at least once a week as a weekly newspaper and is and was a newspaper of general circulation in said county and Territory, and that the annexed is a true copy of the "order of court" as it was published in the regular and entire issue of said paper and not in sup-lement form thereof for a period of seven consecutive weeks, commencing on the 8th day of February, 1889, and ending on the fifteenth day of March, 1889, and that said newspaper was regularly distributed to its subscribers during all of said period, and was published in said newspaper proper and not in sup-lement form.

T. G. NICKLIN.

Subscribed and sworn to before me this 23rd day of March, 1889.

[SEAL.] GEO. M. SO RELLE,
Notary Public in and for Whatcom County, W. T.

(Endorsed on back:)
No. 269. Filed April 10, 1889. W. E. Ledgerwood, clerk, by C. Donovan, deputy.

250 *Order of Court.*

In the District Court of the Third Judicial District, Washington Territory, Holding Terms at Whatcom in and for Whatcom County.

In the Matter of the Application of EDWARD ELDRIDGE, Erastus Bartlett, and Hugh Eldridge to Perpetrate the Testimony of Edward Eldridge, Harriet Peterson, and H. C. Barkhousen in Relation to the Title, Claim, and Interest of Applicants in and to the Jones Donation Claim, in said County,
vs.
THE UNKNOWN HEIRS OF BETSY JONES, Deceased. } Order.

The statement of Edward Eldridge, Erastus Bartlett, and Hugh Eldridge, setting forth that the petitioners are the owners of the

Jones donation claim, in said county, and that their title is derived through Thomas Jones and Betsy Jones, the said Betsy Jones executing and acknowledging the said deed by Thomas Jones, her attorney-in-fact; that said power of attorney has never been filed for record in the office of the auditor of said county and cannot be found, and that Edward Eldridge, Harriet Peterson, and H. C. Barkhousen are the only living witnesses to the execution and existence of above-described power of attorney, and that it is desirous that their testimony be perpetuated in reference to the same; and it further appearing that said Betsy Jones departed this life without leaving heirs to the knowledge of petitioners:

251 Now, therefore, it is ordered, on motion of J. P. De Mattos, Esq., attorney for petitioners, that the 13th day of April, A. D. 1889, at ten o'clock in the forenoon of that day, at the court-room, at Seattle, Wash. Ter'y, be, and the same is hereby, appointed the time and place for hearing such application, and notice thereof and the statement be served on all persons mentioned therein as adversely interested in the matter, on all those living within the Territory at least twenty days before the time for hearing such application and upon those who are not residents by publication or otherwise in the same manner as a notice is served upon a non-resident, as is provided by law.

Dated at Seattle, W. T., February 1, 1889.

THOMAS BURKE, *Judge.*

Now, therefore, the unknown heirs of Betsy Jones, deceased, and all persons having or claiming any interest adverse to applicants in the Jones donation claim are notified to be and appear at the time and place specified in said order and show cause, if any they have, why an order should not be made allowing the examination of said witnesses, or their default will be entered and the prayer of said statement granted.

Witness my hand and the seal of the said court this 7th day of February, A. D. 1889.

W. E. LEDGERWOOD, *Clerk,*
[COURT SEAL.] By C. DONOVAN, *Deputy Clerk.*

JAMES P. DE MATTOS, *Attorney.*

(Endorsed on back:)
No. 269. Filed April 10, 1889. W. E. Ledgerwood, clerk, by C. Donovan, deputy.

252 In the District Court of the Third Judicial District of Washington Territory, Holding Terms at Whatcom in and for Whatcom County.

In the Matter of the Application of EDWARD ELDRIDGE, ERASTUS Bartlett, and Hugh Eldridge to Perpetuate the Testimony of Edward Eldridge, Harriet Peterson, and H. C. Barkhousen in Relation to the Title, Claim, and Interest of Applicants in and to the Jones Donation Claim, in said County,

vs.

THE UNKNOWN HEIRS OF BETSY JONES, Deceased.

This cause, on this 13th day of April, A. D. 1889, coming on regularly to be heard before the judge of this court, at the court-room, at Seattle, in King county, Washington Territory, at ten o'clock in the forenoon of that day, on motion of J. P. De Mattos, Esq., attorney for petitioners, the same stands adjourned to the nineteenth day of April, A. D. 1889, at the same hour and place, that being the first time and opportunity for hearing of the same: and on this 19th day of April, A. D. 1889, said cause coming on regularly to be heard before the judge of this court upon the application by petition of Edward Eldridge, Erastus Bartlett, and Hugh Eldridge to perpetuate the testimony of Edward Eldridge, Harriet Peterson, and H. C. Barkhousen in relation to the title, claim, and interest of applicants in and to the Jones donation claim, in said county of Whatcom, heretofore, on, to wit, January 16th, A. D. 1889, duly filed in the office of the clerk of this court,
253 therein praying that the judge of this court allow the examination of said witnesses, Edward Eldridge, Harriet Peterson, and H. C. Barkhousen, for the purpose of perpetuating their testimony and to appoint a commissioner to take the same, as in said petition prayed, now, upon reading and filing due and satisfactory proof of publication of the order herein heretofore, on February 1st, 1889, made by Hon. Thomas Burke, judge of said court, appointing the time and place of hearing such application and directing service of notice thereof and of the statement therein, as in said order particularly directed, and no one appearing on said 13th day of April, 1889, at the hour and place aforesaid on behalf of said unknown heirs of Betsy Jones, deceased, and no one appearing on their behalf on this day in obedience to the requirements of said order to show cause as therein required, now, on motion of J. P. De Mattos, attorney for petitioners, it is ordered that the default of all persons having or claiming interest adverse to applicants in the said Jones donation claim and of all of the unknown heirs of Betsy Jones, deceased, be, and the same is hereby, entered, and the judge of this court being fully satisfied that there is sufficient cause for taking the depositions of said witnesses named in the said matter, now, therefore, on like motion of said J. P. De Mattos, attorney for petitioners, it is ordered that the examination of said witnesses be, and the same is hereby, allowed, and a commission is hereby directed to issue therefor to C. M. Kellogg, Esq., in like

manner as a commission to take testimony of witnesses as in other cases.

C. H. HANFORD,
Judge of said District Court.

254 (Endorsed on back:)

269. Edward Eldridge and others *vs.* The Unknown Heirs of Betsy Jones, Deceased. Order. Filed in clerk's office May 4th, A. D. 1889. R. M. Hopkins, clerk, by C. Donovan, deputy.

255 In the District Court of the Third Judicial District, Washington Territory, Holding Terms at Whatcom in and for Whatcom County.

In the Matter of the Application of EDWARD ELDRIDGE, ERASTUS Bartlett, and Hugh Eldridge to Perpetuate the Testimony of Edward Eldridge, Harriet Peterson, and H. C. Barkhousen in Relation to the Title, Claim, and Interest of Applicants in and to the Jones Donation Claim, in said County,

vs.

THE UNKNOWN HEIRS OF BETSEY JONES, Deceased.

Interrogatories to be propounded to Edward Eldridge and H. C. Barkhousen, witnesses in above matter, before C. M. Kellogg, Esq., commissioner appointed by the court to take said testimony.

Interrogatories to H. C. Barkhousen.

Int. 1. What is your name, age, occupation, and place of residence?

Int. 2. Where did you reside during the month of March, 1862?

Int. 3. Were you at that time acquainted with Thomas Jones or Betsy Jones, his wife?

Int. 4. What official position, if any, did you hold on or about the 28th day of March, 1862?

Int. 5. Look at volume "G," page 27, of the Records of Deeds, in the office of the auditor of Whatcom county, W. T., and state what is recorded therein and in whose handwriting the same is recorded, if you know.

Int. 6. By whom was said deed witnessed?

Int. 7. Before whom was it acknowledged?

256 Int. 8. Where was Betsy Jones, if you know, at the time of the execution and acknowledgement of said deed?

Int. 9. If you state that Betsy Jones executed this deed by her attorney-in-fact, Thomas Jones, was you cognizant at the time of the execution and acknowledgement of the same of the fact of said attorneyship existing; and, if so, how did you obtain such knowledge?

Int. 10. Please state what authority — gave to Thomas Jones and whether or not the said instrument was executed and acknowledged in legal form.

Interrogatories to Edward Eldridge.

Int. 1. State your name, age, occupation, and place of residence

Int. 2. Was you acquainted with Thomas Jones and Betsy Jones, his wife, on or about the 28th day of March, 1862? If so, state what business transaction you had with them or either of them on said date.

Int. 3. Do you know where the power of attorney from Betsy Jones to Thomas Jones now is?

Int. 4. Did you ever examine*d* the records of any other county in this Territory — which Thomas Jones and Betsy Jones were supposed to own real estate; and, if so, what was the result as to this power of attorney?

Int. 5. Have you the original deed of Thomas Jones and Betsy Jones conveying the Jones donation claim to you? If you have not, what has become of it?

Int. 6. Is this a true copy of said original deed (showing witnesses a copy, to be filed herein as an exhibit)?

Int. 7. Where is Betsy Jones?

Int. 8. If you say you saw the original power of attorney from Betsy Jones and Thomas Jones, her husband, please state how the same was executed and acknowledged.

Whatcom, W. T., 1889, May 1, 1889.

J. P. DE MATTOS,
Attorney for Applicants.

(Endorsed:) Filed in clerk's office May 20, 1889. R. M. Hopkins, clerk, by T. G. Nicklin, dept.

257 In the District Court of the Third Judicial District, Washington Territory, Holding Terms at Whatcom in and for Whatcom County.

In the Matter of the Application of EDWARD ELDRIDGE, ERASTUS Bartlett, and Hugh Eldridge to Perpetuate the Testimony of Edward Eldridge, Harriet Peterson, and H. C. Barkhousen in Relat*i*on to the Title, Claim, and Interest of Applicants in and to the Jones Donation Claim, in said County,

vs.

THE UNKNOWN HEIRS OF BETSY JONES, Deceased.

Whereas it appears to the judge of the above-entitled court that Edward Eldridge, Harriet Peterson, and H. C. Barkhousen are material witnesses in the above-entitled matter, and that the personal attendance of said witnesses is necessary under the statute in such cases made and provided, that the same may be taken and returned as set forth in said statute:

Now, therefore, in confidence of your prudence and fidelity, we have appointed you and by these presence do appoint you, C. M. Kellogg, a commissioner to examine said witnesses, and we do there-

fore authorize and empower you, at certain days and places to be by you for that purpose appointed, diligently to examine said witnesses on written interrogatories filed by the applicants and cross-interrogatories filed by any party adversely interested, and upon their respective oaths, first taken before you, cause the said
258 examination of the said witnesses to be reduced to writing and signed by the said witnesses to the testimony so given by each respectively and signed *and signed* and certified by yourself, and then return the same, annexed to this commission, unto this court with all convenient speed, enclosed under your seal.

Witness Honorable C. H. Hanford, judge of said district court, and the seal of said court, affixed this 20th day of May, 1889.

R. M. HOPKINS,
Clerk Court *of the District Court of the Third Judicial District, Holding Terms at Whatcom, in Whatcom County,*
[SEAL.] By T. G. NICKLIN, *Deputy Clerk.*

(Endorsed on back:)
No. 269. Commission.

259 *Depositions of Witnesses Taken Before Mr. C. M. Kellog, a Commissioner Appointed by the Judge of the Third Judicial District of Wash. Ter., on the 20th Day of May,* 1889.

H. C. BARKHOUSER, of lawful age, being first duly sworn, on his oath deposes and says:

Question. What is your name, age, occupation, and place of residence?

Answer. H. C. Barkhousen; farmer; fifty-three years; Fidalgo, Skagit county.

Question. Where did you reside during the month of March, 1862?

Answer. The town of Whatcom, Whatcom county.

Question. Was you at that time acquainted with Thomas Jones or Betsy Jones, his wife?

Answer. Well acquainted with both of them.

Question. What official position, if any, did you hold on or about the 28th day of March, 1862?

Answer. County auditor and recorder of Whatcom Co., W. T.

Question. Look at vol. "G," page 27, of the Records of Deeds, in the office of the auditor of Whatcom Co., W. T., and state what is recorded therein and in whose handwriting the same is recorded, if you know.

260 (Witness examines the above.)

Answer. I have examined that record. It is a deed recorded on that page from Thomas Jones and his wife, by her attorney-in-fact, Thomas Jones, to Edward Eldridge. It is the Jones donation claim. The same is recorded in my handwriting.

Question. By whom was said deed witnessed?
Answer. William Smith and H. C. Barkhousen.
Question. Before whom was it acknowledged?
Answer. Before H. C. Barkhousen, county auditor.
Question. Where was Betsy Jones, if you knew, at the time of the execution and acknowledgement of said deed?
Answer. I think she was in British Columbia.

Edward Eldridge, the applicant, here introduces a certified copy of said deed, marked Exhibit "A" and made a part of this deposition.

Question. You have stated that Betsy Jones executed this deed by her attorney-in-fact, Thomas Jones. Was you cognizant at the time of the execution and acknowledgement of the same of the fact of said attorneyship existing; and, if so, how did you obtain such knowledge?

261 Answer. I knew of the fact because I saw the power of attorney. I saw it at the time of the execution and acknowledgement of the deed.

Question. Please state what authority said power of attorney gave to Thomas Jones and whether or not the said instrument was executed and acknowledged in legal form.
Answer. To the best of my recollection it gave him full power of attorney to sell and convey property in this deed mentioned, as well as other property belonging to her. To the best of my knowledge it was in legal form, duly signed, witnessed, and acknowledged.

H. C. BARKHOUSEN.

Edward Eldridge, of lawful age, being first duly sworn, deposes and says:

Question. State your name, age, occupation, and place of residence.
Answer. Edward Eldridge; sixty; farmer; New Whatcom.
Question. Was you acquainted with Thomas Jones and Betsy Jones, his wife, on or about the 28th day of March, 1862? If so, state what business transaction you had with them or either of them on said date.

262 Answer. I was; had known them intimately for a number of years. To the best of my recollection they left here for British Columbia in 1860, leaving a good deal of property belonging to them here. In the spring of 1862 Thomas Jones returned to dispose of the property if he could. I purchased the donation claim of him and his wife known as the Jones donation claim. He showed me a power of attorney executed in British Columbia authorizing him to sell all her real estate in Whatcom county, Wash. Ter. I was not aware of the necessity or importance of having a power of attorney recorded, but when I received the deed I asked him for the power of attorney. He told me that he was not done with it, as he had other property to sell, but when he was done with it he would give it to me. He failed to do so, not imagining

there was any great importance to it. I failed to follow him up until it was some years after he left here. He returned here and lived here the remainder of his life, but I did not imagine it to be of any importance and I never got it.

Question. Then you do not know where said power of attorney now is?

—. No; I do not.

—. Did you ever examine the records of any other Co. in this Ter. in which Thomas and Betsy Jones were supposed to own real estate; and, if so, what was the result as to this power of attorney?

Answer. I examined the records of Jefferson county, where
263 I thought they had real estate, but find no trace of it there.

Question. Have you the original deed of Thomas and Betsy Jones conveying said property to you? If you have not, what has become of it?

Answer. I have not. In 1878 my house was destroyed by fire, and almost all my books and papers were burned, and among them was this deed.

(Showing witness Exhibit "A," filed herein.)

—. Is this a true copy of said original deed?

Answer. To the best of my recollection it is.

Question. Where is Betsy Jones?

—. She died many years ago in British Columbia.

Question. You say you saw the original power of attorney from Betsy Jones to Thomas Jones, her husband? Please state how the same was executed and acknowledged.

Answer. It was signed, witnessed, executed, and acknowledged according to the statutes of Washington Territory.

EDWARD ELDRIDGE.

TERRITORY OF WASHINGTON, }
County of Whatcom. }

I, C. M. Kellogg, a commissioner of the court appointed
264 by a judge of the supreme court of Washington Territory and judge of the third judicial district, do hereby certify that the above deposition was taken before me and reduced to writing by myself, at Whatcom, in said county, on the 20th day of May, 1889, at one o'clock, in pursuance of notice and appointment hereto annexed; that the above-named witnesses before examination *was* sworn to testify the truth, the whole truth, and nothing but the truth, and that the said depositions were carefully read to witnesses and then subscribed by them.

[SEAL.] C. M. KELLOGG,
Commissioner and Notary Public.

Dated at Whatcom the twentieth day of May, 1889.

265 EXHIBIT "A."

Thomas Jones and wife to E. Eldridge. } Deed.

This indenture, made and entered into on this twenty-eighth day of March, in the year of our Lord one thousand eight hundred and sixty-two, in the town of Sehome, county of Whatcom and Territory of Washington, betwixt Thomas Jones and Betsy Jones, his wife, of the said town, of the first part, and Edward Eldridge of the second part,

Witnesseth: That the said Thomas and Betsy Jones of the first part, for and in consideration of the sum of three hundred dollars, lawful money of the United States of America to them in hand paid, the receipt whereof is hereby acknowledged, hath bargained, granted and sold, and by these presents doth bargain, grant and sell, convey and confirm unto the said Edward Eldridge, of the second part, and to his heirs, executors, administrators and assigns, all and singular that certain *peice* or parcel of land situated, lying and being on the north side of Bellingham bay, known as Jones' claim, and more particularly described as follows: Commencing at a stake on the line between section- 29 & 32 in township 38 north, range 3 east, the same being 12.80 chains east of post corner to sections 29 and 30, 31 & 32, thence running east 23.20 chains to another stake in a mound of stone, thence south 45.30 chains to a post; thence west 84 chains, (crossing) the line between sections 31 & 32 at a distance of 36 chains, intersecting said section line at 5.45 chains south of the qu'r-sec. corner) to another post, thence W. 34.20 chains
266 to another post on the south line of E. C. Fitzhugh claim, thence east along said line 20.50 chains to the southeast corner of E. C. Fitzhugh claim, thence N. 2.07 chains to the S. W. corner of Wm. Utter's claim to another post, thence with the south line of said Wm. Utter's claim 40.27 chains crossing the section line between sections 31 & 32 at 27.47 chains, 9.34 chains south of the post corner to sec. 29, 30, 31 & 32, to the post at the S. E. corner to said Utter's claim, thence north 9.30 chains to the place of beginning, containing 320 acres, more or less, together with all the tenements, hereditaments, and appurtenances thereunto belonging, and all the rents, profits and issues, reversions and remainders, together with the estate, title and interest of the said Thomas and Betsy Jones to the said premises, or any part thereof, forever.

In testimony where- we have hereunto set our hands and seals this day above written.

his
THOMAS x JONES. [SEAL.]
mark.
BETSY JONES, [SEAL.]
his
By her attorney-in-fact, THOMAS x JONES.
mark.

Signed, sealed, and delivered in presents of—
WILLIAM SMITH.
H. C. BARKHOUSEN.

TERRITORY OF WASHINGTON, } ss:
County of Whatcom, }

Personally appeared before me, auditor in and for Whatcom county, Thomas Jones, to me well known to be the person
267 who executed the foregoing deed, and acknowledged the execution thereof to be his own free act and deed for the uses and purposes therein specified, and likewise produced a power of attorney from Betsy Jones, his wife (at present a non-resident of this Territory), authorizing him to sell and convey her real estate, and stated that in accordance therewith he had executed the foregoing deed in her behalf for the uses and purposes therein specified.

Given under my hand — seal this twenty-eighth day of March, A. D. 1862.

H. C. BARKHOUSEN,
Auditor in and for Whatcom County.

Filed for record March twenty-eighth, 1862.
Recorded Aprile 4th, 1862.

H. C. BARKHOUSEN, *Recorder.*

TERRITORY OF WASHINGTON, } ss:
County of Whatcom, }

I, Hugh Eldridge, county auditor and *ex officio* recorder of deeds in and for Whatcom county, Washington Territory, hereby certify that the annexed and foregoing is a true copy of a deed from Thomas and Betsy Jones to E. Eldridge as the same appears of record on page 27 of volume "G" of Deed Records of said county.

Witness my hand and official seal this 20th day of May, A. D. 1889.

[SEAL.] HUGH ELDRIDGE,
County Auditor in and for Whatcom County, W. T.,
By —— ——, *Deputy.*

268 (Endorsed on back:)
Thomas Jones — Betsy Jones to Edward Eldridge.
(Envelope endorsed as follows:)
Clerk of district court, Whatcom, Wash. Ter. Testimony of witnesses taken in the matter perpetuating testimony "In the matter of the application of Edward Eldridge, Erastus Bartlett, and Hugh Eldridge to perpetuate the testimony of Edward Eldridge, Harriet Peterson, and H. C. Barkhousen in relation — claim and interest of applicants in and to the Jones donation claim, in said Co., *vs.* The Unknown Heirs of Betsy Jones, deceased." Taken before C. M. Kellogg, comm'r. No. 269. C. M. Kellogg. Commissions and testimony returned and filed June 6th, 1889. T. G. Nicklin, dep. clerk.

269 In the Superior Court of Whatcom County, State of Washington.

In the Matter of the Application of EDWARD ELDRIDGE, ERASTUS Bartlett, and Hugh Eldridge to Perpetuate the Testimony of Edward Eldridge, Harriet Peterson, and H. C. Barkhousen in Relation to Title, Claim, and Interest of Applicants in and to the Jones Donation Claim, in said County,

vs.

THE UNKNOWN HEIRS OF BETSY JONES, Deceased.

Certificate of Clerk.

STATE OF WASHINGTON, } ss:
County of Whatcom, }

I, C. C. Hixson, county clerk and *ex officio* clerk of the superior court of Whatcom county, State of Washington, do hereby certify that the within and foregoing is a full, true, and correct copy of the pleadings, papers, orders, and files in the above-entitled matter as the same now appear on file and of record in my office.

Witness my hand and the seal of said court, affixed at my office, in New Whatcom, Washington, this 12th day of March, 1892.

C. C. HIXON,
Clerk as Aforesaid,

[SEAL.] By C. H. HURLBUT,
Deputy Clerk.

270 PLAINTIFF'S EXHIBIT "O."

Copy of the Assessment of the Jones Donation Claim as Assessed for Years 1878 *to* 1889, *Inc.*

To whom assessed.	Descrip'n of land.	Sec.	Tp.	Range.	Road dist.	Sch'l dist.	No. acres.	Total valuation.
1878.								
Bartlett, Erastus...	½ Jones don. claim	.....	38	3 E.	x	.....	160	320
Eldridge, E.....	Und. ½ Jones don. claim	32	38	3 E.	x	.....	160	320
1879.								
Bartlett, Erastus...	Jones don. claim	31, 32	38	3 E.	1	1	321	642
Eldridge, Hugh....	1 acre in Jones donation claim	31	38	3 E.	1	1	1	3
1880.								
Bartlett, Erastus...	Jones don. claim	31, 32	38	3 E.	1	1	321	642
Eldridge, Hugh....	1 acre in Jones donation claim	.....	38	3 E.	.....	.....	1	2
1881.								
Bartlett, Erastus...	Jones donation claim	31 and 32	38	3 E.	1	1	320	600
Eldridge, Hugh.....	1 acre in N. W. corner Jones donation claim.	31	38	3 E.	1	1	1	2
1882.								
Bartlett, Erastus..	Jones donation claim	31 and 32	38	3 E.	1	1	321	600
Eldridge, Hugh.....	1 acre in N. W. corner Jones donation claim.	31	38	3 E.	1	1	1	3
1883.								
Bartlett, Erastus...	Jones donation claim	31 and 32	38	3 E.	1	1	320	960
Eldridge, Hugh.....	1 acre in N. W. corner of Jones donation claim.	31	38	3 E.	1	1	.....	10
1884.								
Bartlett, Erastus...	Und. ¾ of Jones donation claim	31, 32	38	3 E	1	.....	240	2,400
Eldridge, Edward.	Und. ¼ of Jones donation claim	.....	.....	.....	1	.....	80	800
Eldridge, Hugh.....	Corner of Jones donation claim	.....	.....	.....	.....	.....	1	20
1885.								
Bartlett, Erastus..	Und. ¾ Jones donation claim	31 & 32	38	3 E.	25	4	240	1,440
Eldridge, Edward..	Und. ¼ Jones donation claim	31 & 32	38	3 E.	25	2	80	480
Eldridge, Hugh.....	1 acre in N. W. corner of Jones donation claim.	.....	.....	.....	1	4	1	10
1886.								
Bartlett, Erastus...	Und. ¾ Jones donation claim	31 & 32	38	3 E.	25	4	240	1,440
Eldridge, Edward..	Und. ¼ Jones donation claim	31 & 32	38	3 E.	25	2	80	480
Eldridge, Hugh.....	1 acre in N. W. corner Jones donation claim.	31	38	3 E.	25	2	1	10
271 1887.								
Bartlett, Erastus..	Und. ¾ Jones donation claim	31, 32	38	3 E.	25	4	240	1,440
Eldridge, Edward..	Und. ¼ Jones donation claim	31	38	3 E.	25	2	80	480
Eldridge, Hugh.....	1 sq. acre in N. W. corner Jones donation claim.	.....	38	3 E.	25	2	1	10
1888.								
Bartlett, Erastus..	Und. ¾ Jones donation claim	32	38	3 E	25	4	240	3,000
Eldridge, Edward..	Und. ¼ Jones donation claim	.....	.....	.....	.....	.....	80	1,000
Eldridge, Hugh S..	1 square acre in N. W. — Jones donation claim.	.....	38	3 E.	.....	.....	1	25
1889.								
Bartlett, Erastus...	Und. ¾ Jones donation claim	.....	.....	.....	1-25	4	240	18,000
Eldridge, Edward..	Und. ¼ Jones donation claim	.....	.....	.....	25	4	80	6,000

STATE OF WASHINGTON, } ss:
County of Whatcom, }

I, E. L. Collier, county auditor and *ex officio* recorder of deeds in and for Whatcom county, State of Washington, hereby certify that the foregoing is a correct copy of the assessment of the Jones donation claim (that is, to whom assessed, description of land, and valuation) as the same appears on the assessment-rolls for the years 1878 to 1889, inclusive, as shown in the foregoing copy.

Witness my hand and official seal this twelfth day of February, A. D. 1892.

E. L. COLLIER,
[SEAL.] *County Auditor in and for Whatcom County, State of Washington.*

272 DEFENDANT'S EXHIBIT "1."

Mary and William Lovatt to Carmi Dibble. } No. 15946. Deed.

This indenture made this seventh day of May, in the year of our Lord, eighteen hundred and ninety-one, between Mary Lovatt and William Lovatt, husband and wife, of Hanley, Staffordshire, England, the parties of the first part, and Carmi Dibble, of the city of New Whatcom, Whatcom county, State of Washington, the party of the second part,

Witnesseth: That the said parties of the first part, for and in consideration of the sum of three hundred dollars, lawful money of the United States to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns, the following-described tracts and parcels of land, situate, lying and being in the county of Whatcom, State of Washington, and particularly bounded and described as follows, to wit: Lot thirteen (13) in block three (3) according to the recorded plats of the city of Whatcom, as on file and recorded in the auditor's office of said Whatcom county, and also that tract known as the Jones donation claim it being claim number forty-two, and being a part of sections thirty-one and thirty-two, township thirty-eight, north of range three east, according to the official plats and surveys thereof, as filed in the Government
273 land office, and being particularly described as beginning at a point thirty-six chains and twenty-three links east of the northwest corner of the said section thirty-two, thence south nine chains and thirty links, thence west forty chains and twenty-two links, thence south two chains and seven links, thence west twenty chains and fifty links, thence south thirty-four chains and twenty links, thence east eighty-three chains and ninety links, thence north forty-five chains and thirty links to the place of beginning, together with the appurtenances, to have and to hold the said premises, with

the appurtenances unto the said party of the second part, and his heirs and assigns forever.

It being the intention of this instrument to convey to said second party the interest of first party as heirs-at-law of Betsy Jones, deceased, in and to the above-described premises; and the said Mary Lovatt, party of the first part does by these presents covenant grant and agree to and with the said party of the second part, his heirs and assigns, that she, the said Mary Lovett, is the sister of the whole blood of said Betsy Jones, wife of Thomas Jones, late of Whatcom aforesaid, said Mary Lovett and Betsy Jones being begotten in lawful wedlock of Henry Blackhouse and Mary Blackhouse, his wife, and said Mary Lovatt does further covenant and agree with second party, his heirs and assigns, that her said father and mother, Henry and Mary Blackhouse, died intestate, leaving them surviving no living issue, saving and except said Mary Lovatt, the first party,
274 and Rose Anna Hill, now Rose Anna Carter, and William Hill and Mary Hill, now Mary Wilkes, said three last-named persons being the children of a deceased sister of said Mary Lovatt, first part- hereto.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

MARY LOVATT. [L. S.]

his
WILLIAM x LOVATT. [L. S.]
mark.

Signed, sealed, and delivered in the presence of—
JOHN DIXSON APPLEBY.
ALFRED L. BLACK.

ENGLAND,
County of Staffordshire, } *ss:*

On this seventh day of May, A. D. 1891, before me, the undersigned, mayor of the city of Hanly, in said county, personally came Mary Lovatt and William Lovatt, her husband, to me known to be the individuals described in and who executed the within instrument, and acknowledged that they signed, sealed, and delivered the same as their free and voluntary act and deed for the uses and purposes therein mentioned, and the said Mary Lovatt, wife of said William Lovatt, upon an examination by me separate and apart from her husband, when the contents of said instrument were by me fully made known unto her, acknowledged that she did voluntarily, of her own free will, and without the fear of or coercion from her husband execute the same.

275 Witness my hand and official seal the day and year in this certificate first above written.

[The Common Seal of the Borough of Hanley.]

MICHAEL HUNTBACK,
Mayor of Hanley.

ENGLAND, } ss:
County of Staffordshire, }

On the seventh day of May, A. D. 1891, before me, the undersigned, a notary public in and for the State of Washington, at Hanley, England, personally came Mary Lovatt and William Lovatt, her husband, to me known to be the individuals described in and who executed the within instrument, and severally acknowledged that they signed, sealed, and delivered the same as their voluntary act and deed for the uses and purposes therein mentioned.

{ Alfred L. Black, Notary Public. Expiration of Commission, Sept. 25, 1894. State of Washington. }

ALFRED L. BLACK,
Notary Public for Wash., Residing at New Whatcom.

Received for record at 9.10 a. m., June 4th, A. D. 1891, and recorded at request of A. L. Black.

E. L. COLLIER,
County Auditor of Whatcom County, State of Washington.

276 STATE OF WASHINGTON, } ss:
County of Whatcom, }

I, E. L. Collier, county auditor and *ex officio* recorder of deeds in and for Whatcom county, State of Washington, hereby certify that the annexed and foregoing is a true copy of deed from Mary and Wm. Lovatt to Carmi Dibble as the same appears of record on page 31 of volume 25 of Deed Records of said county.

Witness my hand and official seal this thirteenth day of January, A. D. 1892.

E. L. COLLIER,
[SEAL.] *County Auditor in and for Whatcom County, State of Washington.*

277 DEFENDANT'S EXHIBIT "2."

Rose Anna Carter *et al.* to Carmi Dibble. } No. 15947. Deed.

This indenture made this eighth day of May, in the year of our Lord eighteen hundred and ninety-one, between Rose Anna Carter and James Carter, husband and wife, of Northwood, Hanley, and William Hill, of Shelton, Hanley, and Mary Wilkes and Joseph Wilkes, husband and wife, of Badley Hedge, Hanley, all in the county of Staffordshire, England, the parties of the first part, and Carmi Dibble of the city of New Whatcom, Whatcom county, State of Washington, the party of the second part,

Witnesseth: That the said parties of the first part, for and in consideration of the sum of three hundred dollars, lawful money of the United States, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by

these presents grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns, the following-described tracts and parcels of land, situate, lying and being in the county of Whatcom, State of Washington, and particularly bounded and described as follows, to wit: Lot thirteen (13) in block three (3) according to the recorded plats of the city of What-
278 com, as rile- and recorded in the auditor's office of said Whatcom county, and also that tract known as the Jones donation claim, it being claim number forty-two, and being a part of sections thirty-one and thirty-two, township thirty-eight, north of range three east, according to the official plats and surveys thereof, as filed in the Government land office, and being particularly described as beginning at a point thirty-six chains and twenty-three links east of the northwest corner of the said section thirty-two, thence running west twenty-three chains and forty-three links, thence south nine chains and thirty links, thence west forty chains and twenty-two links, thence south two chains and seven links, thence west twenty chains and fifty links, thence south thirty-four chains and twenty links, thence east eighty-three chains and ninety links, thence north forty-five chains and thirty links to the place of beginning, together with the appurtenances, to have and to hold the said premises with the apppurtenances unto the said party of the second part, and to him and his heirs and assigns forever.

It being the intention of this instrument to convey to said second party the interest of first party as heirs-at-law of Betsy Jones, deceased, in and to the above-described premises.

The said Rose Anna Carter, William Hill, and Mary Wilkes of the first part do by these presents covenant, grant and agree to and with the said party of the second —, his heirs and assigns, that they are all the heirs-at-law of Ann and James Hill, and that said
279 Ann and James Hill dies intestate, and that said Ann Hill was a sister of the whole blood of the said Betsy Jones, wife of Thomas Jones, late of Whatcom aforesaid.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

her
ROSE ANNA x CARTER. [L. S.]
mark.

his
JAMES x CARTER. [L. S.]
mark.

WILLIAM HILL. [L. S.]
MARY WILKES. [L. S.]
JOSEPH WILKES. [L. S.]

Signed, sealed, and delivered in the presence of—

ALFRED L. BLACK.
MICHAEL HUNTBACK,
Mayor of Hanley.

ENGLAND, }
County of Staffordshire, } *ss:*

On this eighth day of May, A. D. 1894, before me, the undersigned, mayor of the city of Hanley, in said county, personally came Rose Anna Carter and James Carter, husband and wife, and William Hill and Mary Wilkes and Joseph Wilkes, husband and wife, to me known to be the individuals described in and who executed the within instrument, and severally acknowledged that they signed, sealed, and delivered the same as their free and voluntary act and deed for the uses and purposes therein mentioned, and the said Rose Anna Carter and Mary Wilkes, wives of the said James Carter and Joseph Wilkes, upon an examination by me separate and
280 apart from their respective husbands, when the contents of said instrument were by me fully made known to them, *they* severally acknowledged that they did voluntarily, of their own free will and without the fear of or coercion from their respective husbands, execute the same.

Witness my hand and official seal the day and year in *th* this certificate first above written.

[The Common Seal of the Borough of Hanley.]

MICHAEL HUNTBACH,
Mayor of Hanley.

ENGLAND, }
County of Staffordshire, } *ss:*

On the eighth day of May, A. D. 1891, before me, the undersigned, a notary public in and for the State of Washington, at Hanley, England, personally came Rose Anna Carter, James Carter, William Hill, Mary Wilkes, and Joseph Wilkes, to me known to be the individuals described in and who executed the within instrument, and severally acknowledged that they signed, sealed, and delivered the same as their voluntary act and deed for the uses and purposes therein mentioned.

{ Alfred L. Black, Notary Public. Expiration of Commission, Sept. 25, 1894. State of Washington. }

ALFRED L. BLACK,
Notary Public for Wash., Residing at New Whatcom.

Received for record at 9.10 a. m., June 4th, A. D. 1891, and recorded at the request of A. L. Black.

E. L. COLLIER,
County Auditor of Whatcom County, State of Washington.

281 STATE OF WASHINGTON, }
County of Whatcom, } *ss:*

I, E. L. Collier, county auditor and *ex officio* recorder of deeds in and for Whatcom county, State of Washington, hereby certify that the annexed and foregoing is a true copy of deed from Rose Anna

Carter *et al.* to Carmi Dibble as the same appears of record on page 32 of volume 25 of Deed Records of said county.

Witness my hand and official seal this thirteenth day of January, A. D. 1892.

E. L. COLLIER,
[SEAL.] *County Auditor in and for Whatcom County, State of Washington.*

282 DEFENDANT'S EXHIBIT "3."

Know all men by these presents, that we, Thomas Jones and Betsy, wife of said Thomas Jones, of Whatcom, Washington Territory, in consideration of our love and affection for our adopted child, T. W. Olney, of whom O. W. Olney is the father, have granted, bargained, sold, and conveyed and by these presents do grant, bargain, sell and convey unto the said T. W. Olney, his heirs &c., all our right, title and interest of, in and to the following-described premises, situated in Whatcom, Washington Territory, and known on the official map of said Whatcom as lots Nos. 14 fourteen, (15) fifteen (16) sixteen on Division street, together with all the buildings and improvements, appurtenances thereunto or in anywise belonging, to have and to hold the same to the said T. W. Olney, his heirs &c., forever.

In testimony whereof we, the said Thomas Jones and Betsy Jones, (who hereby relinquish all dower & right of dower in said premises) have hereunto set our hands and affixed our seals this, the eighth day of January, A. D. 1859.

his
THOS. x JONES. [SEAL.]
mark.
BETSY JONES. [SEAL.]

Signed, sealed, and delivered in presence of—
W. S. SPEAR.
H. R. CROSBIE.

TERRITORY OF WASHINGTON, } ss:
County of Whatcom, }

Be it remembered that on this 8th day of January, 1859, personally appeared before me, a notary public in and for said
283 county, Thos. Jones and Betsy, his wife, to me personally known to be the parties described in and who executed the foregoing conveyance, and acknowledged they executed the same freely and voluntarily and for the uses and purposes therein expressed; and the said Betsy Jones, having been by me examined separate and apart from her husband and the contents of the within conveyance having been by me made known to her, acknowledged that she executed the same of her own free will and accord and without fear or coercion on the part of her husband, and does not wish to retract the same.

In witness whereof I have hereunto affixed my hand and notarial seal, at Whatcom, W. T., the day and year above written.

[NOTARY SEAL.] HENRY R. CROSBY,
Notary Public.

Filed and recorded in auditor's office, Whatcom county, W. T., Jan'y 8th, at five o'clock p. m., 1859.

J. W. LYSLE, *Recorder.*

STATE OF WASHINGTON, }
County of Whatcom, } *ss:*

I, E. L. Collier, county auditor and *ex officio* recorder of deeds in and for Whatcom county, State of Washington, hereby certify that the annexed and foregoing is a true copy — deed from Thos. Jones *et ux.* to T. W. Olney as the same appears of record on page 60 of volume "D" of Deed Records of said county.

Witness my hand and official seal this eighteenth day of
284 January, A. D. 1892.

E. L. COLLIER,
County Auditor in and for Whatcom County,
State of Washington,
[SEAL.] By A. J. WIEPERT, *Deputy.*

285 DEFENDANT'S EXHIBIT "4."

Know all men by these presents, that we, Thomas Jones & Betsy, his wife, of Whatcom, Washington Territory, in consideration of the sum of one hundred & twenty-five dollars, to us in hand paid by John Herring of same place, have bargained, sold & conveyed and by these presents do bargain, sell & convey unto the said John Herring all of our right, title and interest of, in and to the following-described premises in Whatcom aforesaid, to wit:—Lot No. fifteen (15) and part of lot No. sixteen (16) in block three on Division street, being the premises known as the Metropolis, together with all the buildings & improvements thereon.

To have and to hold the same to the said John Herring, his heirs, &c., forever.

Provided always, and these presents are upon the express condition that,

Whereas: the said Thomas Jones has this day executed and delivered to the said John Herring his certain promissory note of this date for the sum of one hundred and twenty-five dollars, with interest at five per cent. per month until paid, payable in sixty days from date.

Now, should the said Thomas Jones well & truly pay off and discharge said note, according to the true intent & meaning thereof, then this obligation to be void, else to be & remain in full force and effect.

Witness our hands and seals this 4th day of January, A. D. 1858.

286 THOMAS his x mark. JONES. [SEAL.]
BETSY JONES. [SEAL.]

Signed, sealed, & delivered in presence of—
WM. S. SPEAR.
H. R. CROSBIE.

TERRITORY OF WASHINGTON, } ss:
County of Whatcom, }

Be it remembered that on this 4th day of January, 1859, personally appeared before me, a notary public in and for said county, Thomas Jones and Betsy Jones, his wife, personally known to me to be the parties who executed the foregoing instrument, and acknowledged that they executed the same freely and voluntarily and for the uses and purposes therein mentioned; and the said Betsy Jones, having been examined by me separate and apart from her husband and the contents of the within conveyance having been by me mad- known to her, acknowledged that she executed the foregoing instrument voluntarily, of her own free will, and without the fear of or coercion from her husband.

In witness whereof I have hereunto set my hand — affixed my notarial seal, at Whatcom, the day and year above written.

HENRY R. CROSBIE,
[NOTARY SEAL.] *Notary Public.*

Filed for record in auditor's office, Whatcom Co., Jan'y 4th, at 2 o'clock p. m., 1859.

J. W. LYSLE, *Auditor.*
J. W. LYSLE, *Recorder.*

Recorded Jan'y 5th, 1859.

287 STATE OF WASHINGTON, } ss:
County of Whatcom, }

I, E. L. Collier, county auditor and *ex officio* recorder of deeds in and for Whatcom county, State of Washington, hereby certify that the annexed and foregoing is a true copy of mortgage from Thos. Jones *et ux.* to John Herring as the same appears of record on page 286 of volume "E" of Deed Records of said county.

Witness my hand and official seal this eighteenth day of January, A. D. 1892.

E. L. COLLIER,
County Auditor in and for Whatcom County,
State of Washington,
[SEAL.] By A. J. WIEPERT, *Deputy.*

288 The undersigned, attorneys of the plaintiff in the above-stated action, hereby waive notice of the time and place for

certifying the agreed statement of facts in the said action, and do hereby consent and agree to the facts embodied in the foregoing as a true statement of all the facts in said case not already a part of the records thereof.

H. Y. THOMPSON AND
KERR & McCORD,
Attorneys for Plaintiff.

In the Superior Court of Whatcom County, State of Washington.

BELLINGHAM BAY LAND COMPANY, Plaintiff,
vs.
CARMI DIBBLE, Defendant.

I, John R. Winn, do hereby certify that I am the regularly acting and qualified judge of the superior court of Whatcom county, Washington, and am the judge who presided at the trial of the above-entitled action, and that the foregoing is a full, true, and ac--urate statement of all the facts in said action that are not already a part of the records thereof, and includes all the testimony taken at the trial of said action, together with all objections and exceptions taken or rejection of testimony, which facts are by this certificate made a part of the said records.

JNO. R. WINN, *Judge.*

Dated Feb. 27th, 1892.

(Endorsed:) Filed March 1st, 1892. C. C. Hixson, clerk, by C. H. Hurlbut, deputy.

289 In the Superior Court of the State of Washington in and for the County of Whatcom.

BELLINGHAM BAY LAND COMPANY, Plaintiff,
vs.
CARMI DIBBLE, Defendant.
} Complaint.

The plaintiff in the above-named suit complains of the defendant, and for cause of suit alleges:

I.

That the plaintiff is a private corporation duly organized under the laws of the State of Washington, having its principal office and place of business in the city of Fairhaven, in the county of Whatcom and State of Washington, and under and by virtue of its charter having full power to purchase, own, hold, and sell real estate and all such business as may appertain thereto.

II.

The plaintiff alleges that long prior to the 28th day of March, 1862, one Thomas Jones and Betsy Jones, his wife, were the owners of the following-described property, to wit:

290 A donation land claim, being claim No. 42 and being parts of sections 31 and 32, in township 38 north, range 3 east, beginning at a point 36 chains and 23 links east of the northwest corner of said section 32, thence west 23 chains and forty-three links, thence south nine chains and thirty links, thence west 40 chains and 22 links, thence south 2 chains and 7 links, thence west 20 chains and 50 links, thence south 34 chains and 20 links, thence east 83 chains and 90 links, thence north 45 chains and 30 links to the place of beginning, in the district of lands subject to sale at Olympia, then in Washington Territory, containing 321.35 acres.

III.

The plaintiff alleges that on the said 28th day of March, 1862, for full consideration paid therefor, the said Thomas Jones, for himself and as attorney-in-fact for Betsy Jones, his wife, duly made a good and sufficient deed and conveyed the above-described tract of land to one Edward Eldridge; which said deed was duly acknowledged and placed upon the records in said Whatcom county, in the Territory of Washington.

IV.

The plaintiff alleges that prior to the execution of said deed Betsy Jones, wife of said Thomas Jones, had duly made, executed, and delivered her power of attorney to the said Thomas Jones to sell and conver said lands hereinbefore described and all her right, title, and interest therein; that the said power of attorney
291 was executed u-der the seal of the said Betsy Jones and was duly acknowledged, witnessed, and properly certified, but that by some oversight the same was not placed on the records of the county of Whatcom and has since become lost; that this said power of attorney on the 28th day of March, 1862, had not been revoked, but was then in full force and operation.

V.

That the plaintiff, The Bellingham Bay Land Co., has succeeded by a chain of mesne conveyances to the title of the said Thomas Jones and his wife, Betsy Jones, in and to all the l-nds hereinbefore described, excepting as follows: A small tract commencing at the southeast corner of the William Utter donation claim, thence south twenty feet, thence west to the southwest corner of the William Utter donatuon claim, thence east along the southern boundary of the said William Utter donation land claim to the place of beginning; and also excepting lots No. 1, 2, 3, 4, and 5, in block No. 13, and lots No. 6, 7, 8, 9, 10, and 11, in block No. 15, in the Eldridge & Bartlett addition to the town of Sehome, as shown on plat of said town, in the office of the auditor of said county, filed for record on the 21st day of April, 1889.

That the plaintiff is the equitable owner of all said donation land claim of Thomas Jones and his wife, Betsy Jones, excepting that part which is hereinbefore excepted and is now in possession

thereof; that the plaintiff and its grantors have been in the actual, open, and notorious possession of said property continuously since the 28th day of March, 1862, under the color and (claim) of title.

292 VI.

The plaintiff alleges that neither the defendant nor his grantors, ancestors, or predecessors have been seized or possessed of the premises in question or any part or parcel thereof within more than ten years before the date of the commencement of this suit.

VII.

The plaintiff alleges that the defendant, Carmi Dibble, claims to be the owner and to have procured a deed for the said land hereinbefore described to himself and certain associates, who are to this plaintiff unknown and are publicly threatening a suit in court to claim a title to said property; that the claim of the defendants is based on the fact that the said power of attorney hereinbefore referred to has not been placed on record and creates a cloud on the title of the plaintiff to said property; that the plaintiff has no speedy or adequate remedy at law.

Wherefore the plaintiff prays that — the decree of this honorable court:

First. That the existence of said power of attorney may be established.

Second. That the plaintiff may be decreed to be the owner in fee of said lands hereinbefore described; and,

Third. That the defendant and his unknown associates may be decreed to have no interest in said lands, and that the plaintiff's title therein may be by decree of this court quieted and made absolute, and for such other and further relief as to the court may seem meet in equity and good con-cience.

H. Y. THOMPSON,
Att'y for Plaintiff.

293 STATE OF WASHINGTON, } ss:
County of Whatcom, }

I, Edward Eldridge, being first duly sworn, say that I am the president of the plaintiff, The Bellingham Bay Land Co.; that I have read and know the contents of the foregoing complaint, and that the matters and things therein set forth are true, as I verily believe.

EDWARD ELDRIDGE.

Subscribed and sworn to before me this 9 day of June, A. D. 1891.

FRANK J. HAMILTON,
[SEAL.] *Notary Public for the State of Washington, Residing at Fairhaven.*

Filed June 9th, 1891.

C. C. HIXSON, *Clerk,*
By H. H. PIERCE, *Deputy.*

294 In the Superior Court of the State of Washington for Whatcom County.

THE BELLINGHAM BAY LAND COMPANY
vs.
CARMI DIBBLE.

To the clerk of the court above named:

You will please issue summons in the above cause to be served on the defendant personally.

H. Y. THOMPSON,
Att'y for Plaintiff.

(Endorsed on back:)

No. 801. In the superior court, State of Washington, county of Whatcom. Bellingham Bay Land Company *vs.* Carmi Dibble. Precipe for summons. Filed June 9th, 1891. C. C. Hixon, clerk, by H. H. Peirce, deputy. H. Y. Thompson, att'y for petitioner.

295 I, J. H. Woolery, sheriff of King county, State of Washington, do hereby certify that I received the annexed summons on the 9th day of June, 1891, and personally served the same on the 10th day of June, 1891, on Carmi Dibble, he being the defendant named in said summons, by delievering to him, said defendant, personally, in said King county, a copy of said summons and therewith a copy of the complaint, certified by the plaintiff's attorney to be a true copy of the original in the action named in said summons.

Dated this the 10th day of June, 1891.

J. H. WOOLERY, *Sheriff*,
By J. F. McDONALD, *Deputy*.

Sheriff's Fees.

Serving summons	$1 00
Serving complaint	1 00
Copy of summons	40
Travel	20
Total	$2 60

Fees paid.

296 In the Superior Court of the State of Washington for Whatcom County.

BELLINGHAM BAY LAND COMPANY, Plaintiff,
vs.
CARMI DIBBLE, Defendant.
No. 801.

The State of Washington to Carmi Dibble, Greeting:

You are hereby required to appear in the superior court of the State of Washington for the county of Whatcom within twenty days after the day of service of this summons upon you, if served

in said county of Whatcom, or, if served in any other county, then within thirty days after the day of service, and answer the complaint of the above-named plaintiff, now on file in the office of the clerk of said court, a copy of which complaint is herewith delivered to you; and, unless you so appear and answer, the plaintiff will apply to the court for the relief demanded in said complaint.

Witness my hand and the seal of said court this 9th day of June, 1891.

C. C. HIXSON,
Clerk of said Court,
[SEAL.] By H. H. PEIRCE, *Deputy.*

(Endorsed:) No. 801. Bellingham Bay Land Company
297 *vs.* Carmi Dibble, def't. Summons. Sheriff's office, King county, Washington. Rec'd June 10, 1891; served 10th, by M. C. D. H. Y. Thompson, attorney for plaintiff.

298 In the Superior Court of Whatcom County, State of Washington.

BELLINGHAM BAY LAND COMPANY, Plaintiff,
vs.
CARMI DIBBLE, Defendant.
} Motion.

Comes now the above-named defendant, by Harris, Black & Leaming, his attorneys, and moves the court:

1st. To cause the plaintiff to make the second paragraph in the complaint filed herein more definite and certain, in that the plaintiff be compelled to state what interest in each part of the tract in the said paragraph contained was owned by Thomas Jones and what interest was owned by Betsy Jones, his wife, prior to the twenty-eighth day of March, A. D. 1862.

2nd. And the said defendant further moves the court to strike from the third paragraph of the said complaint the words "For full consideration paid therefor" and the words "And as the attorney-in-fact for Betsy Jones, his wife, duly — a good and sufficient," as being irrelevant and immaterial.

3rd. And the defendant further moves to strike the fourth paragraph from the said complaint as being irrelevant and immaterial.

299 4th. And the defendant moves to strike that part of the fifth paragraph in the said complaint embraced in the following words: "That the plaintiff is the equitable owner of all of the said donation lands claimed of Thomas Jones and his wife, Betsy Jones, excepting that part which is hereinbefore excepted," as being irrelevant and immaterial.

HARRIS, BLACK & LEAMING,
Attorneys of Defendant.

Copy rec'd.

H. Y. THOMPSON.

Filed June 23rd, 1891.

C. C. HIXON, *Clerk,*
By C. H. HURLBUT, *Deputy.*

300 In the Superior Court of the State of Washington for the County of Whatcom.

THE BELLINGHAM BAY LAND COMPANY, Plaintiff,
vs.
CARMI DIBBLE, Defendant.

The plaintiff in the above-entitled suit, by this its amended complaint (leave for filing the same having been heretofore duly obtained from the above-entitled court), complains of the defendant, and for cause of suit alleges:

I.

That the plaintiff is a private corporation, duly organized under the laws of the State of Washington, having its principal office and place of business at the city of Fairhaven, county of Whatcom and State of Washington, and under and by virtue of its charter having full power to purchase, own, and sell real estate and perform all such business as may appertain thereto.

II.

The plaintiff alleges that long prior to the 28th day of March, 1862, one Thomas Jones and Betsy Jones, his wife, were
301 the owners of the following-described property, to wit: A donation land claim, being claim number 42 and being portions of sections 31 and 32, in township 38 north, range 3 east, beginning at a point 36 chains and 23 links east of the northwest corner of said section 32, thence west 23 chains and 43 links, thence south 9 chains and 30 links, thence west 40 chains and 22 links, thence south 2 chains and 7 links, thence west 20 chains and 50 links, thence south 34 chains and 30 links, thence east 83 chains and 90 links, thence north 45 chains and 30 links to the place of beginning, in the district of lands subject to sale in Olympia, then in Washington Territory, and containing 321 and 35 one-hundredth acres.

That the said lands were donated by the United States to the said Thomas Jones and Betsy Jones, his wife, as follows: The west half thereof to the said Thomas Jones and the east half thereof to the said Betsy Jones, his wife.

III.

The plaintiff alleges that on the said 28th day of March, 1862, for a full consideration paid thereof, the said Thomas Jones, for himself and as attorney-in-fact for the said Betsy Jones, his wife, made *and* good and sufficient deed and conveyed the above-described tract of land to one Edward Eldridge; which said deed was duly acknowledged and placed upon the records in said Whatcom county, in the Territory of Washington.

III.

The plaintiff alleges that prior to the execution of said
302 deed Betsy Jones, wife of the said Thomas Jones, had duly made, executed, and delivered her power of attorney to the said Thomas Jones to sell and convey the said lands hereinbefore described and all her right, title, and interest therein; that the said power of attorney was executed under seal of said Betsy Jones and was duly acknowledged, witnessed, and properly certified, but by some oversight the same was not placed on the records of Whatcom county and has since that time become lost; that the said power of attorney, on the 28th day of April, 1862, had not been revoked, but was then in full force and operation.

IV.

The plaintiff, The Bellingham Bay Land Company, has succeeded by a chain of mesne conveyances to the title of the said Thomas Jones and his wife, Betsy Jones, in and to all the lands here*in*tofore described, excepting as follows: A small tract commencing at the southeast corner of the William Utter donation claim, thence south 20 feet, thence west to the southeast corner of the William Utter donation claim, thence east along the southern boundary of the said William Utter donation claim to the place of beginning, and also excepting lots numbers 1, 2, 3, 4, and 5, in block number 13, and lots numbers 6, 7, 8, 9, 10, and 11, in block number 15, in the Eldridge & Bartlett addition to the town of Sehome, as shown on the plat of said town in the office of the auditor of said county, filed for record on the 21st day of April, 1889; that the plaintiff is the equitable owner of all of said donation land claim of
303 Thomas Jones and his wife, Betsy Jones, excepting that part which is hereinbefore excepted, and is now in possession thereof; that the plaintiff and its grantors have been in the actual, open, and notorious possession of the said property continuously since the 28th day of March, 1862, under color and claim of title.

VI.

The plaintiff alleges that neither the defendants nor his grantors, ancestors, or predecessors have been seized and possessed of the premises in question or any part thereof within more than ten years before the date of the commencement of this suit.

VII.

That the plaintiff alleges that the *plaintiff*, Carmi Dibble, claims to be the owner and to have procured a deed of the said lands hereinbefore described to himself for his own benefit, and is threatening to bring suit to establish title to the said property, and publicly and openly claims to be the owner of the said property.

VIII.

The claim of the defendant is based upon the following facts, to wit:

First. That he alleges that the said power of attorney was void and was not and is not sufficient for the purpose of conferring any authority upon the said Thomas Jones to make the said conveyance hereinbefore referred to; and, secondly, that the said power of attorney was never placed upon record. Thirdly, the plaintiff alleges that long before the year 1888 the said Betsy J. A. K. Jones, wife of the said Thomas Jones, died intes-
304 tate; that she left surviving her as heirs-at-law a sister, Mrs. Mary Lovatt, Rosanna Carter, William Hill, and Mary Wilkes, children of Ann Hill, deceased, which said Ann Hill was also a sister of the said Betsy Jones; that on the 8th day of May, 1891, the said defendant procured from the said Rosanna Carter and James Carter, her husband, William Hill, Mary Wilkes and Joseph Wilkes, her husband, a deed for the said lands, which said deed was filed for record by the defendant in the office of the auditor of Whatcom county on the 4th day of June, 1891, and was by the said auditor duly recorded in Book of Deeds No. 25, on pages 33 and 34 thereof; that on the 7th day of May, 1891, the said defendant procured from the said Mary Lovatt and William Lovatt, her husband, a deed purporting to convey the premises herein described, which said deed was filed by the defendant with the auditor of Whatcom county for record on the 4th day of June, 1891, and was duly recorded in Book of Records No. 25, on pages 31 and 32 thereof, on said day; that under and by virtue of the said deeds the said defendant claims to be the owner of the said premises, and the said claims and assertions and deeds of the defendant hereinbefore described constitute a cloud upon the plaintiff's title to the said property; that the plaintiff has no speedy or adequate remedy at law, and is entitled to have the said cloud removed and the said deed to the said Carmi Dibble declared to be inoperative and void for the purpose of conveying the title to the said premises or any part or parcel thereof.

IX.

The defendant alleges that the fact that the said power of attorney was not placed on record, and the fact that the said
305 persons claiming to be heirs-at-law of the said Betsy Jones have executed the deeds hereinbefore described and referred to to the said Carmi Dibble, is a cloud upon the title to the said lands which the plaintiff is entitled to have removed.

Wherefore the plaintiff prays a decree of this honorable court—

First. That the existence and validity of the said power of attorney may be established.

Second. That the plaintiff may be decreed to be the owner in fee of the said lands hereinbefore described, and that the plaintiff's title thereto may be quieted.

Third. That the defendant may be decreed to have no interest in

the said lands or any right or title thereto, and for such other and further relief as to the court may seem meet in equity and good con-cience.

H. Y. THOMPSON,
Attorney for Plaintiff.

306 STATE OF WASHINGTON, } ss:
County of Whatcom, }

I, Edward Eldridge, being first duly sworn, say that I am the president of the *defendant*, The Bellingham Bay Land Co.; that I have read and know the contents of the foregoing complaint, and that the matters therein set forth are true, as I verily believe.

EDWARD ELDRIDGE,
President B. B. Land Co.

Subscribed and sworn to before me this 6th day of August, 1891.

ALBERT SHERMAN,
Notary Public for the State of Washington,
Residing at Fairhaven.

Filed August 6, 1891.

C. C. HIXSON, *Clerk,*
By C. H. HURLBUT, *Deputy.*

307 In the Superior Court of Whatcom County, State of Washington.

BELLINGHAM BAY LAND COMPANY, Plaintiff,
v.
CARMI DIBBLE, Defendant. } Motion.

Comes now the above-named defendant, by Harris, Black & Leaming, his attorneys, and moves the court:

1st. To strike from the amended complaint filed herein, in the third paragraph thereof, the words "for himself and as attorney-in-fact for the said Betsy Jones, his wife, made good and sufficient," for the reason that they are immaterial and redundent.

2nd. And also to strike that portion of the said amended complaint, being the second paragraph, marked "No. 3," beginning with the words "The plaintiff alleges that prior to," &c., and ending with the words "in full force and operation," for the reason that the same is immaterial and redundent.

HARRIS, BLACK & LEAMING,
Attorneys for Defendant.

Service accepted.

H. Y. THOMPSON,
Att'y — Pl'ff.

308 (Endorsed:) Motion. Filed Aug. 22nd, 1891. C. C. Hixson, clerk, by H. H. Peirce, deputy.

309 In the Superior Court of Whatcom County, State of Washington.

THE BELLINGHAM BAY LAND COMPANY, Plaintiff,
vs.
CARMI DIBBLE, Defendant. } Order.

This matter coming on to be heard on motion to strike certain portions of the amended complaint filed herein, and the matter having been fully argued and the court being fully advised in the premises—

It is ordered and adjudged that said motion to strike be, and the same is hereby, denied, and that an exception be, and the same is hereby, granted to the defendant to such ruling.

JNO. R. WINN,
Superior Court Judge.

(Endorsed:) Filed Jan'y 5th, 1892, at 4.35 p. m. C. C. Hixson, clerk, by C. H. Hurlbut, deputy.

310 In the Superior Court of Whatcom County, State of Washington.

THE BELLINGHAM BAY LAND COMPANY, Plaintiff,
vs.
CARMI DIBBLE, Defendant. } Disclaimer.

Comes now the above-named defendant, Carmi Dibble, and disclaims any and all right, title, and interest in and to the west half of a donation claim situated in the county of Whatcom, State of Washington, and described as claim number forty-two, and being portions of sections thirty-one and thirty-two, in township thirty-eight north, range three east, beginning at a point thirty-six chains and twenty-three links east of the northwest corner of said section thirty-two, thence west twenty-three chains and forty-three links, thence south nine chains and thirty links, thence west forty chains and twenty-two links, thence south two chains and seven links, thence west twenty chains and fifty links, thence south thirty-four chains and twenty links, thence east eighty-three chains and ninety links, thence north forty-five chains and thirty links, to the
311 place of beginning, alleged to have been acquired by him in the complaint filed herein under and by virtue of two certain deeds in said complaint set out, as made to the above-named defendant by Mrs. Mary Lovatt and William Lovatt, her husband, on the seventh day of May, 1891, and by Rosanna Carter and James Carter, husband; William Hill, Mary Wilks, and Joseph Wilks, her husband, on the eighth day of May, 1891, the intention of this instrument being to disclaim all title acquired by virtue of said two last-mentioned deeds in and to the west one-half of the said claim, but in nowise to effect the east one-half of the said claim by this disclaimer.

HARRIS, BLACK & LEAMING,
Attorneys for Defendant.

STATE OF WASHINGTON, } ss:
County of Whatcom, }

Carmi Dibble, being first duly sworn, upon his oath says that he is the defendant in the above-entitled action; that he has read the foregoing disclaimer, knows the contents thereof, and believes the same to be true.

CARMI DIBBLE.

Subscribed and sworn to before me this 31 day of December, A. D. 1891.

ALFRED L. BLACK,
Notary Public in and for the State of Washington,
Residing at New Whatcom.

(Endorsed:) Copy rec'd. H. Y. Thompson, J. A. Kerr, att'ys for pl'ff. Dec. 26, '91. Filed Jan. 5th, 1891. C. C. Hixson, clerk, by C. H. Hurlbut, deputy.

312 In the Superior Court of Whatcom County, State of Washington.

THE BELLINGHAM BAY LAND COMPANY, Plaintiff, }
vs. } Demurrer.
CARMI DIBBLE, Defendant. }

Comes now the above-named defendant and demurs to the amended complaint filed in the above-entitled action, and for a cause of said demurrer states—

That said amended complaint does not state facts sufficient to constitute a cause of action.

HARRIS, BLACK & LEAMING,
Attorneys for Defendant.

Service accepted.

H. Y. THOMPSON & J. A. KERR,
Att'ys for Pl'ff.

(Endorsed:) Filed Jan. 5th, 1892, at 4.37 p. m. C. C. Hixson, clerk, by C. H. Hurlbut, deputy.

313 In the Superior Court of Whatcom County, State of Washington.

THE BELLINGHAM BAY LAND COMPANY, Plaintiff, }
vs. } Order.
CARMI DIBBLE, Defendant. }

The above-entitled cause coming on to be heard in the presence of counsel for plaintiff and defendant on the demurrer to the amended complaint filed herein, and the parties having been respectively heard by counsel and the court being fully advised in the premises—

It is ordered and decreed that the demurrer to the amended complaint filed herein be, and the same is hereby, overruled; to which ruling the defendant excepts; which exception is by the court allowed.

JNO. R. WINN,
Superior Court Judge.

(Endorsed:) Filed Jan. 5th, 1892, at 4.38 p. m. C. C. Hixson, clerk, by C. H. Hurlbut, deputy.

314 In the Superior Court of Whatcom County, State of Washington.

BELLINGHAM BAY LAND COMPANY, Plaintiff,
vs.
CARMI DIBBLE, Defendant. } Answer.

Comes now the above-named defendant and filed this his answer to the amended complaint filed in the above-entitled action.

Answering the third paragraph of the said amended complaint, this defendant denies that on the twenty-eighth day of March, 1862, or at any time, for a valuable consideration paid therefor or for any consideration paid therefor, that the said Thomas Jones did, either for himself or as attorney-in-fact for Betsy Jones, his wife, or for any other person, make a good and sufficient deed, or any deed, to convey or to attempt to convey that part of the tract of land in Whatcom county, State of Washington, described as a donation claim, being claim number forty-two, and being portions of sections thi-ty-one and thirty-two, in township thirty-eight north of range three east, beginning at a point thirty-six chains and twenty-three links
315 east of the northwest corner of said section thirty-two, thence west twenty-three chains and forty-three links, thence south nine chains and thirty links, thence west forty chains and twenty-two links, thence south two chains and seven links, thence west twenty chains and fifty links, thence south thirty-four chains and twenty links, thence east eighty-three chains and ninety links, thence north forty-five chains and thirty links, to the place of beginning, and denies that said tract of land or any part thereof was by any deed conveyed or attempted to be conveyed to one Edward Eldridge; and denies that said deed or any deed was duly acknowledged or acknowledged in anywise; and denies that any such deed or any deed was placed upon the records of Whatcom county, in Washington Territory, or in any county of any State or Territory.

Answering that portion of said amended complaint marked as paragraph three, which in fact should be the next succeeding paragraph, this defendant denies that prior to the execution of a deed in said paragraph contained Betsy Jones, wife of Thomas Jones, made, executed, and delivered her power of attorney to said Thomas Jones to sell and convey the said lands hereinbefore described, and all her right, title, and interest therein; and denies that said Betsy Jones at any time made a power of attorney to Thomas Jones or to

any other person; and denies the making, execution, and delivery of any power of attorney of any kind, nature, or description by the said Betsy Jones to the said Thomas Jones or to any person whatever; and denies that any power of attorney was executed under the seal of the said Betsy Jones; and denies that any power of attorney was ever acknowledged by Betsy Jones;
316 and denies that any power of attorney was ever witnessed or certified to by said Betsy Jones; and denies any oversight in in the placing of said power of attorney on the records of Whatcom county, but admits that there is not and never has been any power of attorney executed by the said Betsy Jones or ever recorded by the said Betsy Jones, or by any other person, on the records of Whatcom county or any other county; and denies that any power of attorney from the said Betsy Jones to the said Thomas Jones or to any other person was in force or effect or in any way in existence on the twenty-eighth day of April, 1862; and denies that any power of attorney, if any such there was in existence, had not been revoked, but alleges that any power of attorney, if any power of attorney ever did exist, executed by the said Betsy Jones had been revoked.

Answering that part of the said amended complaint marked paragraph four, which in reality should be paragraph five, this defendant denies that the plaintiff had secured by a chain of *mean* conveyances or by any chain of any conveyances the title of the said Thomas Jones and his wife, Betsy Jones, in and to the land heretofore described, or the title of either Thomas Jones or Betsy Jones, or the title of any person whatever in and to the lands heretofore described or any part thereof; and denies that the plaintiff is the equitable owner or is the owner of any interest in and to the said donation claim of the said Thomas Jones and Betsy Jones or either said Thomas Jones or Betsy Jones, or any part of the said land claim;
317 and denies that the plaintiff is now in possession of the said claim or any part thereof; and denies that the plaintiff and its grantors or any of them have been in the actual, open, and notorious possession of the said property continuously since the twenty-sixth day of March, 1862; and denies that they have at any time since said date been in the actual possession of said land or any part thereof; and denies that they have at any time since said date been in the open possession of said land or any part thereof; and denies that they have been at any time since said date in the notorious possession of said land or any part thereof; and denies that they have ever at any time been in possession of the said land or any part thereof in any sense whatever, either under claim of title or otherwise.

Answering the sixth paragraph of the said amended complaint, this defendant denies the same and each and every part thereof and avers the truth to be that this defendant and his grantors, predecessors, and ancestors have at all times been seized and possessed of the premises hereinbefore described as the east one-half of the said Jones donation claim, and of each and every part thereof, up to and until the present date.

Answering the seventh paragraph of the said amended complaint,

this defendant admits that he claimed to be the owner of the east one-half of the premises hereinbefore described, which said premises are known as the east one-half of the Jones donation claim, and admits that he is the owner in fee-simple of the said premises, and admits that he claimed to have procured a deed of the said land described as the east one-half of the donation claim for himself and
for his own benefit, and admits that he has procured such a
318 deed, and admits that he publicly and openly claimed to be the owner of the last-described property.

Answering to the eighth paragraph of the said amended complaint, this defendant admits that his claim is based upon the following facts and admits and expressly charges the following to be the facts and to be true:

He admits that he claimed that the power of attorney heretofore referred to was void and was not and is not sufficient for the purpose of conferring any authority upon the said Thomas Jones to make the said conveyance heretofore referred to, even if in fact any such power of attorney ever did exist, and he admits that said power of attorney and no power of attorney was ever placed upon the records of Whatcom county, and charges the fact to be that no power of attorney from the said Betsy Jones to the said Thomas Jones ever has been placed of record upon the records of Whatcom county, and admits and charges the fact to be that this defendant has at no time had any knowledge or notice, either actual or constructive, of any power of attorney from said Betsy Jones to said Thomas Jones or to any other person whatever, and admits that he claimed that long prior to the year 1888 and charges and alleges the fact to be that long prior to said date the said Betsy Jones, wife of the said Thomas Jones, died intestate, and admits that he claimed and charges the fact to be that said Betsy Jones left surviving her as her sole heirs-at-law a sister, Mrs. Mary Lovatt, and Rosanna
Carter, William Hill, and Mary Wilks, children of Ann Hill,
319 deceased, which said An- Hill was also a sister of the said Betsy Jones; and this defendant admits that he claimed and charges that the fact is that on the eighth day of May, 1891, this defendant procured from Rosanna Carter and James Carter, her husband; William Hill, Mary Wilks and Joseph Wilks, her husband, a deed for the east one-half of the land above described, it being the east one-half of the Jones donation claim, which said deed plaintiff admits he claimed to have been and charges the fact to be that said deed was filed for record by this defendant in the office of the auditor of Whatcom county on the fourth day of June, 1891, and was by the said auditor duly recorded in Book Twenty-five of Deeds, pages thirty-three and thirty-four; and this defendant admits that he claimed and alleges the fact to be that on the seventh day of May, 1891, this defendant procured from the said Mary Lovatt and William Lovatt, her husband, a deed conveying the east one-half of the premises above described, known as the east one-half of the Jones donation claim, which said deed defendant admits he claimed and charges and alleges was as a fact filed by this defendant with the auditor of Whatcom county on the fourth

day of June, 1891, and was duly recorded in Book of Records Twenty-five, on pages thirty-one and thirty-two, on said day; and this defendant admits that he claimed and alleges and charges as a fact that by virtue of said deeds this defendant is the owner in fee-simple of the east one-half of the said premises above described, to wit, the east one-half of the said Jones donation claim.

And, further answering said eighth paragraph, this de-
320 fendant denies that the plaintiff has no speedy and adequate remedy at law, and denies that plaintiff is entitled to have any relief and have any cloud removed by reason of said deeds of this defendant, and denies that plaintiff is entitled to have said deeds decreed inadequate and void for the purpose of conveying the title of the said premises or any part thereof.

And, answering the ninth paragraph of the said amended complaint, defendant denies that the fact that the power of attorney in said paragraph referred to was not placed upon record is a cloud upon the title of plaintiff, and denies that the fact that the persons claiming to be heirs-at-law of the said Betsy Jones have executed the deeds hereinbefore described and referred to *to* this defendant is a cloud upon the title of the plaintiff to said premises, and denies that plaintiff is entitled to have said alleged clouds or either of them removed.

And for an affirmative defense and by way of cross-complaint to said amended complaint this defendant alleges:

1.

That on the first day of April, 1862, and at all times thereafter up to and until the date of the death of the said Betsy Jones, said Betsy Jones was the owner in fee-simple and in possession of the east one-half of the donation land claim hereinafter described, to wit, of the east one-half of the said Jones donation claim.

2.

321 That no other conveyance save the conveyance hereinafter referred to as made to this defendant and no power of attorney or other instrument in writing is or at any time has been of record upon the records of Whatcom county whereby the above-named Betsy Jones or any heirs, executors, administrators, or assigns of the above-named Betsy Jones at any time has conveyed or in anywise encumbered the east one-half of a donation land claim situate in Whatcom county, State of Washington, being claim number 42 and being portions of sections thirty-one and thirty-two, in township thirty-eight north, of range three east, beginning at a point thirty-six chain*d* and twenty-three links east of the northwest corner of said section thirty-two, thence west twe*h*ty-three chains and forty-three links, thence south nine chains and thirty links, thence west forty chains and twenty-two links, thence south two chains and seven links, thence west twenty chains and fifty links, thence south thirty-four chains and twenty links, thence east eighty-three chain- and ninety links, thence north forty-five chains

and thirty links to the place of beginning, to wit, the east one-half of the Jones donation claim; and further aver- that this defendant at no time has had any notice, actual or otherwise, of the execution or delivery of any deed or any power of attorney from the said Betsy Jones to Thomas Jones, Edward Eldridge, or to any other person whatever whereby said premises last above described were in anywise effected.

III.

That this defendant innocently and without knowledge, notice, information, understanding, intimation, or belief in or of the
322 existence of any power of atttorney, deed, or instrument in any way encumbering or authorizing the conveyance of the east one-half of said land above described, to wit, the east one-half of the Jones donation claim, purchased and paid for the same a large sum of money, to wit, a sum in excess of six hundred dollars, for deeds of conveyance, absolute in fee-simple, containing words of grant from Mary Lovatt and William Lovatt, her husband, and Rosanna Carter and James Carter, her husband, William Hill, and Mary Wilkes and Joseph Wilkes, her husband, the sole heirs-at-law of the said Betsy Jones, deceased, which said deeds were duly executed and delivered by the said parties to this defendant, and are duly of record in the auditor's office of Whatcom county, State of Washington.

IV.

That at the time of receiving said deeds of conveyance by this defendant and by the paying of said sums of money said Betsy Jones was deceased and had died intestate, and that at said time said Mary Lovatt, Rosanna Carter, William Hill, and Mary Wilkes were the sole and only heirs-at-law of the said Betsy Jones and owners and in possession of the east one-half of the above-described land claim, to wit, the east one-half of the Jones donation claim, in fee-simple, and that defendant is now in possession thereof.

Wherefore this defendant prays that he may be decreed to be the owner in fee-simple of the east one-half of the said above-described land, to wit, the east half of the Jones donation claim, and
323 that a judgement quieting the title in and to said tract be entered against the plaintiff and in favor of this defendant, and that this defendant may have and recover his costs and charges in this behalf expended, and that this defendant may have such other and further relief as to the court may seem equitable and just.

HARRIS, BLACK & LEAMING,
Attorneys for Defendant.

STATE OF WASHINGTON, } ss:
County of Whatcom, }

Carmi Dibble, being first duly sworn, upon his oath deposes and says that he is the defendant in the above-entitled action; that he

has read the foregoing answer and knows the contents thereof and believes the same to be true.

CARMI DIBBLE.

Subscribed and sworn to before me this 4 day of January, A. D. 1892.

ALFRED L. BLACK,
Notary Public in and for the State of Washington,
Residing at New Whatcom.

(Endorsed:) Copy rec'd. H. Y. Thompson, J. A. Kerr, att'ys for pl'ff. Dec. 26, '91. Filed Jan. 5th, 1892, at 4.39 p. m. C. C. Hixson, clerk, by C. H. Hurlbut, deputy.

324 In the Superior Court for the County of Whatcom, State of Washington.

THE BELLINGHAM BAY LAND CO., Plaintiff,
vs.
CARMI DIBBLE, Defendant.

Comes now the above-named plaintiff and, replying to the answer of the *plaintiff* filed in the above-entitled cause, replies as follows, to wit:

This plaintiff denies each and every allegation in each of the paragraphs 1, 2, 3, 4 of the affirmative defense of the defendant set forth in the said answer, and therefore the plaintiff prays relief as in its amended complaint.

STATE OF WASHINGTON, } *ss:*
County of Whatcom, }

I, Cyrus Gates, being first duly sworn, say that I am the secretary of the plaintiff, and that the foregoing reply is true, as I verily believe.

CYRUS GATES.

325 Subscribed and sworn to before me this 14th day of January, 1892.

[SEAL.] CHAS. T. BROWNING,
Notary Public for the State of Washington,
Residing at Fairhaven.

Copy rec'd.
HARRIS, BLACK & LEAMING.

(Endorsed:) Filed Jan'y 14th, 1892. C. C. Hixson, clerk, by H. H. Peirce, dep-ty.

326 In the Superior Court of the State of Washington for the County of Whatcom, Holding Terms at New Whatcom.

STATE OF WASHINGTON, } ss:
County of Whatcom, }

To Mrs. Peterson and Mrs. Humel:

You are hereby commanded to be and appear forthwith, the 15th day of Jan., 1892, before the superior court of the State of Washington for the county of Whatcom, at the court-house, in New Whatcom, then and there to give evidence in a certain — therein pending, wherein The Bellingham Bay Land Co. is plaintiff and Carmi Dibble defendant, on behalf of the plaintiff.

Herein fail not, and have you then and there this writ.

Witness the Hon. Jno. R. Winn, judge of the said superior court, and the seal of said court, affixed this 15th day of January, A. D. 1892.

[SEAL.] C. C. HIXSON,
County Clerk and Clerk of the Superior Court,
By C. H. HURLBUT, *Deputy.*

(Endorsed:) Sheriff's return.

STATE OF WASHINGTON, }
County of Whatcom. }

I hereby certify that I received the within subpœna on January 15th, 1892, and personally served the same on the 15th day of January, A. D. 1892, on Mrs. Peterson and Mrs. Humel, parties named therein, by delivering to and leaving with said Mrs. Peterson
327 and Mrs. Humel personally, in the county of Whatcom, a true and correct — of said subpœna.

Dated this 15th day of January, A. D. 1892.

F. W. DE LORRIMER, *Sheriff.*

Sheriff's Fees.

Serving subpœna	80
Copy of "	50
Mileage	40
	$1 70

Filed this 15th day of Jan'y, A. D. 1892.

C. C. HIXSON, *Clerk,*
By H. H. PERICE, *Deputy.*

H. Y. THOMPSON,
Att'y for Pl'ff.

328 In the Superior Court of the State of Washington for the County of Whatcom.

THE BELLINGHAM BAY LAND COMPANY, Plaintiff,
vs.
CARMI DIBBLE, Defendant.

The above-entitled cause having heretofore been brought before the court and fully argued upon the testimony and the issues presented by the respective parties, and the court having considered the cause, and the plaintiff appearing by H. Y. Thompson and J. A. Kerr, its attorneys, and the defendant by Messrs. Black & Leaming, his attorneys, the court finds the facts and the law in the said cause as follows:

Findings of Facts.

I.

The court finds that the plaintiff, The Bellingham Bay Land Company, is a private corporation, duly organized and existing under the laws of the State of Washington, having its principal office and place of business at the city of Fairhaven, in the county of Whatcom and State of Washington, and under and by virtue of
329 its charter having full powers to purchase, own, and sell real estate and to perform all business appertaining thereto.

II.

The court finds that on and prior to the 28th day of March, 1862, Thomas Jones and Betsy Jones, his wife, were the owners of a certain donation land claim situated in the county of Whatcom and in the then Terrritory but now State of Washington, and that the said donation land claim is more particularly described as follows, to wit: Being claim numbered forty-two (42) and being parts of sections thirty-one (31) and thirty-two (32), in township thirty-eight (38) north, range three (3) east, beginning at a point thirty-six (36) chains twenty-three (23) links east of the northwest corner of said section thirty-two (32), running thence west twenty-three (23) chains and forty-three (43) links; thence nine (9) chains thirty (30) links; thence west forty (40) chains and twenty-two (22) links; thence south two (2) chains and seven (7) links; thence west twenty (20) chains and fifty (50) links; thence south thirty-four (34) chains and thirty (30) links; thence east eighty-three (83) chains and ninety (90) links; thence north forty-five (45) chains and thirty (30) links to place of beginning in the district, of lands subject to sale in Olympia, then in Washington Territory, and containing three hundred and twenty-one and $\frac{35}{100}$ (321.35) acres.

That the said lands were donated to the said Thomas Jones and Betsy Jones, his wife, under the donation laws of the United
330 States, and that under and by virtue of the division which was made of the said lands by the surveyor general and by

the certificate and patent the west half of the said lands was donated to the said Thomas Jones and the east half to the said Betsy Jones, his wife.

III.

The court finds that on the 28th day of March, 1862, for a valuable consideration paid therefor, the said Thomas Jones, for himself and as attorney-in-fact for his said wife, executed good and sufficient deeds of conveyance for all of the above-described tract of land to Edward Eldridge, and that since said date the said Edward Eldridge duly conveyed the said premises to the plaintiff, excepting a small tract which will be hereinafter fully described.

IV.

The court finds that prior to the execution of the said deed by Thomas Jones for himself and as attorney-in-fact for his said wife that the said Betsy Jones had duly executed and delivered her power of attorney to the said Thomas Jones, authorizing him to sell and convey the said lands; that the said power of attorney was executed under seal of said Betsy Jones and was duly acknowledged and witnessed and properly certified, but that the same was not placed upon the records of the said county, but became and still remains lost, and that at the date of the execution of the said deed the said power of attorney had not been revoked.

V.

That prior to the conveyance of the said lands by the said
331 Edward Eldridge to the plaintiff, The Bellingham Bay Land Company, the said Edward Eldridge had conveyed the following-described parcels of said land to persons other than the plaintiff, to wit: A small tract commencing at the southeast corner of the William Utter donation land claim and running thence south twenty (20) feet, thence west to the southeast corner of the William Utter donation land claim, thence east along the south boundary of the said William Utter donation land claim to the place of beginning; also lots numbered one (1), two (2), three (3), four (4), and five (5), in block numbered thirteen (13), and lots numbered six (6), seven (7), eight (8), nine (9), ten (10), and eleven (11), in block numbered fifteen (15), all in the Eldridge and Bartlett addition to the town of Sehome, as shown on the plat of said town in the office of the auditor of said county, filed for record on the 21st day of April, 1889.

VI.

The court finds that on the said 28th day of March, 1862, the said Eldridge entered into possession of all of the said donation claim of Thomas Jones and Betsy Jones, and that from that date to the present time the said Edward Eldridge and his grantees, including the plaintiff in this case, have been continuously and now are in the actual, open, notorious, and adverse possession of all of the said

property under claim and color of title, excepting only the small parcels hereinbefore referred to as having been conveyed to other persons by the said Edward Eldridge.

VII.

The court finds that neither the defendant nor his grantors, ancestors, or predecessors have been seized or possessed
332 of the said premises or any part or parcel thereof at any time since the said 28th day of March, 1862, and that the defendant is not now in possession of the said land.

VIII.

The court finds that the defendant, Carmi Dibble, claims to be the owner of the said premises and claims to have procured deeds for the said lands from persons claiming to be the heirs of Betsy Jones, and has caused the said deeds to be recorded in the office of the auditor of Whatcom county, and that the defendant publicly and openly claims to be the owner of the said property and has created a cloud upon the plaintiff's title thereto.

IX.

The court finds that there is not sufficient evidence to establish the fact that the said Betsy Jones died intestate or that the persons mentioned in the complaint and answer, to wit, Mary Lovatt, Rosanna Carter, William Hill, and Mary Wilkes, are the heirs-at-law of Betsy Jones.

X.

The court finds that at the time when the defendant Dibble claimed to have purchased the said property from the said persons claiming to be the heirs of Betsy Jones that he had full notice and knowledge of the conveyances which had previously been made by Thomas Jones for himself and the said Betsy Jones by Thomas Jones, her attorney-in-fact, and that he had notice of the existence of said power of attorney under which the said Thomas Jones conveyed the said premises, and that the defendant had notice
333 of the fact that the plaintiff, The Bellingham Bay Land Company, was in possession of the said premises, claiming to be the owner thereof under the said deed, and that it and its immediate grantors had been in the possession of the said premises for more than ten years last past.

Findings of Law.

The court finds that the plaintiff is entitled to the relief prayed for in the complaint, and that it is entitled to have the existence and validity of the said power of attorney from Betsy Jones established by decree of the court, and that the plaintiff is entitled to have a decree declaring the plaintiff to be the owner of all of the said east half of the said donation land claim, under and by virtue

of the conveyance made by Thomas Jones for himself and as attorney-in-fact of Betsy Jones to the said Edward Eldridge, and the conveyance made from the said Edward Eldridge and his grantees to this plaintiff; that the plaintiff is entitled to a decree declaring it to be the owner of the west half of the said Thomas Jones donation land claim by reason of the stipulation of the parties hereto and of the disclaimer of ownership heretofore filed in this cause by the defendant, Carmi Dibble, and that the plaintiff is entitled to a decree of this court quieting its title to all of the said donation land claim excepting only the small parcels of land hereinbefore referred to in the findings of facts of the court as having been conveyed by the said Eldridge to persons other than the plaintiff in this cause.

(Enter.) JNO. R. WINN, *Judge.*

334 *Decree.*

Based upon the foregoing findings of fact and of law, the court having duly considered the premises and being fully advised and the respective parties appearing, the plaintiff by H. Y. Thompson and J. A. Kerr, its attorneys, and the defendant by Harris, Black & Leaming, his attorneys, and the court being fully advised, it is considered, adjudged, and decreed that the plaintiff in the above-entitled cause is the owner and is in the possession and is entitled to the possession of the following-described lands, to wit:

Being the donation claim of Thomas Jones and Betsy Jones, his wife, situated in the county of Whatcom and State of Washington, being claim numbered forty-two (42), being portions of sections thirty-one (31) and thirty-two (32), in township thirty-eight (38) north, range three (3) east, beginning at a point thirty-six (36) chains and twenty-three (23) links east of the southwest corner of said section thirty-two (32), running thence west twenty-three (23) chains and forty-three (43) links, thence south nine (9) chains and thirty (30) links, thence west forty (40) chains and twenty-two (22) links, thence south two (2) chains and seven (7) links, thence west twenty (20) chains and fifty (50) links, thence south thirty-four (34) chains and thirty (30) links, thence east eighty-three chains (83 c.) and ninety (90) links, thence north forty-five (45) chains and thirty (30) links to the place of beginning, containing three hundred and twenty-one and $\frac{35}{100}$ (321.35) acres, excepting only therefrom
335 the following-described tracts and parcels of land, to wit:

A small tract commencing at the southeast corner of the William Utter donation land claim, running thence south twenty (20) feet, thence west to the southeast corner of the William Utter donation land claim, thence east along the southern boundary of the said William Utter donation claim to the place of beginning; and also excepting the lots numbered one (1), two (2), three (3), four (4), and five (5), in block numbered th-rteen (13), and lots numbered six (6), seven (7), eight (8), nine (9), ten (10), and eleven (11), in block numbered fifteen (15), in the Eldridge & Bartlett addition to the town of Sehome, as shown on the plat of the said addition in

the office of the auditor of Whatcom county, filed for record on the 21st day of April, 1889.

It is further considered, adjudged, and decreed that the defendant, Carmi Dibble, is not the owner of the said premises or any part or parcel thereof, and that the cloud created upon the title to the said property by the execution of the deeds to Carmi Dibble from Mary Lovatt and William Lovatt, her husband, and Rosanna Carter and James Carter, her husband, and William Hill and Mary Wilkes and Joseph Wilkes, her husband, be, and the same is hereby, removed, and that the title of the plaintiff in and to the said premises be, and the same is hereby, forever quieted against all claims of the defendant, his heirs, successors, or assigns.

It is further considered, adjudged, and decreed that the said
336 power of attorney from the said Betsy Jones to Thomas Jones, her husband, be, and the same is hereby, established, and that the plaintiff have and recover of and from the defendant the costs and disbursements of this suit, taxed at —— dollars.

Def't objects to the findings of law and facts and entry of decree, and exception allowed.

(Enter.) JNO. R. WINN, *Judge.*

(Endorsed:) Filed Feb'y 20th, 1892, at ten o'clock and thirty minutes a. m. C. C. Hixson, clerk, by H. H. Peirce, deputy.

337 In the Superior Court of Whatcom County, State of Washington.

BELLINGHAM BAY IMPROVEMENT COMPANY, Plaintiff, *vs.* CARMI DIBBLE, Defendant.	Notice of Motion for New Trial.

To H. Y. Thompson, attorney of the above-named plaintiff:

You will please take notice that on Saturday, the twentieth day of February, A. D. 1892, before the above-named court, at the courthouse, in the city of New Whatcom, Washington, at the hour of ten o'clock a. m. of said day, we will move for a new trial in the above-entitled action upon the following grounds:

1st. For irregularities in the proceedings of the court.

2nd. For insufficient evidence to justify the decision of the court.

3rd. Because the decision of the court is against the law.

4th. For errors in law occurring at the trial and excepted to at the time by the defendant.

HARRIS, BLACK & LEAMING,
Attorneys of Defendant.

338 (Endorsed:) Filed this 20th day of Feb'y, 1892. C. C. Hixson, clerk; H. H. Peirce, deputy.

339 In the Superior Court of Whatcom County, State of Washington.

BELLINGHAM BAY IMPROVEMENT COMPANY, Plaintiff,
vs.
CARMI DIBBLE, Defendant.
} Motion for a New Trial.

Comes now the above-named defendant and moves the court for a new trial in the above-entitled action, upon the following grounds:

1st. For irregularities in the proceedings of the court.

2nd. For insufficient evidence to justify the decision of the court.

3rd. Because the decision of the court is against the law.

4th. For errors in law occurring at the trial and excepted to at the time by the defendant.

HARRIS, BLACK & LEAMING,
Attorneys of Defendant.

(Endorsed:) Filed this 20th day of Feb'y, 1892. C. C. Hixson, clerk; H. H. Peirce, deputy clerk.

340 In the Superior Court of the State of Washington for Whatcom County.

THE BELLINGHAM BAY LAND CO.
vs.
CARMI DIBBLE.

The above cause came on for hearing on the def't- motion for a new trial, the pl'ff appearing by H. Y. Thompson and J. A. Kerr, its att'ys, and the def't appearing by Harris, Black & Leaming, his att'ys, and the court being fully advised, — is ordered that the said motion be, and the same is hereby, disallowed and in all things denied; to which ruling defendant excepts; which exception is by the court allowed.

(Enter.)

JNO. R. WINN, *Judge.*

(Endorsed:) Filed Feb'y 20th, 1892. C. C. Hixson, clerk.

341 In the Superior Court of Whatcom County, State of Washington.

BELLINGHAM BAY LAND COMPANY, Plaintiff,
vs.
CARMI DIBBLE, Defendant.
} Bond.

Know all men by these presents that we, Carmi Dibble, as principal, and Edmund Cosgrove and Chris. Semon, as sureties, all of the county of Whatcom, State of Washington, are held and firmly bound unto the Bellingham Bay Land Company, a corporation created by and existing under and by virtue of the laws of the State of Washington, in the sum of three hundred dollars, lawful money of the

United States of America, to be paid to the said Bellingham Bay Land Company, its successors and assigns; for which payment, well and truly to be made, we do bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 24th day of February, A. D. 1892.

342 Whereas heretofore, on the twentieth day of February, A. D. 1892, certain findings of fact, conclusions of law, and decree thereon were entered in the above-entitled court; and

Whereas, on the said twentieth day of February, A. D. 1892, an order was made by the above-entitled court overruling a motion for a new trial and rehearing in the above-entitled action by J. R. Winn, judge of the above-entitled court; and

Whereas a notice of appeal has been given by the above-bounden Carmi Dibble, appealing to the supreme court of the State of Washington from the said rulings, findings, and decrees of the said superior court of Whatcom county, Washington, and judgement entered thereon; and

Whereas said appeal is now being prosecuted, the condition of this obligation is that if the above-bounden Carmi Dibble will pay all costs and damages that may be awarded against him in the said appeal or on the dismissal thereof, not exceeding the sum of three hundred dollars, the penalty herein, then this obligation to be void; otherwise to remain in full force and virtue.

CARMI DIBBLE. [SEAL.]
E. COSGROVE. [SEAL.]
CHRIS. SEMON. [SEAL.]

Signed, sealed, and delivered in the presence of—
E. B. LEAMING.
ALFRED L. BLACK.

343 STATE OF WASHINGTON, } *ss:*
County of Whatcom, }

Edmund Cosgrove and Chris. Semon, being sworn, on their respective oaths, according to law, each for himself says that they are residents and freeholders of Whatcom county, and are each worth the sum of three hundred dollars over and above their just debts and liabilities *and* property by law exempt from execution, and that they are not sheriff, under-sheriff, clerk, or other officer of any court, and that they are not attorneys-at-law.

E. COSGROVE.
CHRIS. SEMON.

Sworn and subscribed in my presence this 24th day of February, A. D. 1892.

ALFRED L. BLACK,
Notary Public in and for the State of Washington,
[SEAL.] *County of Whatcom, Residing at New Whatcom.*

(Endorsed:) Filed and approved this 24th day of February, 1892. C. C. Hixson, clerk, by C. H. Hurlbut, deputy.

344 In the Superior Court of Whatcom County, State of Washington.

BELLINGHAM BAY LAND COMPANY, Plaintiff,
vs.
CARMI DIBBLE, Defendant.
} Notice of Appeal.

To The Bellingham Bay Land Company, the above-named *defendant*, and to H. Y. Thompson, Esq., and to J. A. Kerr, Esq., its attorneys:

Take notice that whereas the above-entitled court did, on the twentieth day of February, A. D. 1892, make certain findings of fact and conclusions of law and enter a decree thereon in favor of the above-entitled plaintiff, to which findings and decree the above-named defendant did then and there except, which exception was by the court allowed; and

Whereas on the said twentieth day of February, A. D. 1892, the above-entitled court did make an order overruling a motion for a new trial and rehearing in the above-entitled action:

345 Now, take notice that the above-named defendant appeals from said decisions and each of them and from said findings, decrees, and orders entered thereon.

HARRIS, BLACK & LEAMING,
Attorneys for the Above-named Defendant.

I do hereby acknowledge service of a copy of the above and foregoing notice this 29 day of February, A. D. 1892.

H. Y. THOMPSON,
Of Attorneys of Plaintiff.

(Endorsed:) Filed this 1st day of March, 1892. C. C. Hixson, clerk, by C. H. Hurlbut, deputy.

346 June Term.

NEW WHATCOM, WASH., *July 31st*, 1891.

B. B. LAND CO.
vs.
CARMI DIBBLE.
} 801.

Defendant's motion sustained as to paragraph two (2) and denied as to paragraph four (4) of said complaint. Court adjourned until Aug. 1st, at 9 a. m.

JNO. R. WINN, *Judge.*

(Journal "D," page 337.)

October Term.

THURSDAY, *December 10th*, 1891.

B. B. LAND CO.
vs.
CARMI DIBBLE. } 801.

This cause was postponed for hearing until next Thursday, Dec. 17th, 1891, on account of the sickness of H. Y. Thompson, Esq., attorney for plaintiff.

(Journal "D," page 536.)

DECEMBER 17TH, 1891.

B. B. LAND CO.
vs.
CARMI DIBBLE. } No. 801.

This cause coming up on a motion to strike, interposed by the defendant, argument begun by respective counsel and held open for further argument, as the hour for adjourning had arrrived.

(*Ibid.*, 552.)

347 FRIDAY, *December 18th*, 1891.

B. B. LAND CO.
vs.
CARMI DIBBLE. } No. 801.

Argument of counsel closed in above-entitled cause on motion to strike, interposed by defendant, and taken under advisement by the court.

(Journal "D," page 553.)

WEDNESDAY, *December 23rd*, 1891.

B. B. LAND CO.
vs.
CARMI DIBBLE. } No. 801.

Motion to strike, interposed by defendant, overruled; exceptions asked for and allowed.

(*Ibid.*, 559.)

FRIDAY, *January 15th*, 1892.

BELLINGHAM BAY LAND CO.
vs.
CARMI DIBBLE. } No. 801.

This cause come on regularly for trial, H. Y. Thompson and J. A. Kerr, Esq'r's, attorneys for plaintiff, and Harris, Black & Leaming, attorneys for defendants. Examination of witnesses for pl't'f, including Mrs. Peterson, Mr. Barkhouser, and Mr. Edward Eldridge, for plaintiff, was had, at which time the court adjourned for the day, as the hour of 5 o'clock p. m. had arrived.

(*Ibid.*, page 578.)

348 SATURDAY, *January 16th*, 1892.

B. B. LAND CO. *vs.* CARMI DIBBLE. } 801.

Testimony of witnesses closed and argument continued.
(Journal "D," page 579.)

JANUARY 19TH, 1892.

B. B. LAND CO. *vs.* CARMI DIBBLE. } No. 801.

The above cause, being continued from yesterday, was again called on for trial.

Examination of witnesses was had and finished for both plaintiff and defendant.

(*Ibid.*, 582.)

349 In the Superior Court of Whatcom County, State of Washington.

BELLINGHAM BAY LAND CO., Plaintiff, *vs.* CARMI DIBBLE, Defendant. } No. 801.

Certificate of Clerk.

STATE OF WASHINGTON, *County of Whatcom*, } *ss*:

I, C. C. Hixson, county clerk and *ex officio* clerk of the superior court of Whatcom county, State of Washington, do hereby certify that the within and foregoing is a full, true, and correct transcript of so much of the record in the above and within entitled cause as I am by statute required on appeal to transmit to the supreme court, and, further, that delay was occasioned in the transmission of this record at the request of plaintiff's (respondent's) attorneys, who desired to make use of the same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in New Whatcom, Washington, this 29th day of April, A. D. 1892.

C. C. HIXSON,
Clerk as Aforesaid.

[SEAL.]

350 In the Supreme Court of the State of Washington.

WEDNESDAY, *July* 13, 1892.

BELLINGHAM BAY LAND CO., Respondent, *vs.* CARMI DIBBLE, Appellant. } 563.

This cause coming on to be heard by the court on the transcript of the record of the superior court of Whatcom county and upon the

argument of counsel, the cause was submitted and taken under advisement by the court.

(Page 15, vol. 2, Journal.)

351 THE BELLINGHAM BAY LAND COMPANY, Respondent, v. CARMI DIBBLE, Appellant. } #563. Filed Sept. 17th, 1892.

The pertinent facts in this case are substantially as follows:

On the 28th day of March, 1862, Thomas Jones and Betsy Jones, his wife, were the owners of a donation claim described in the complaint and situated in the county of Whatcom, Territory of Washington, containing 320 acres, the west half having been donated to said Thomas Jones and the east half to said Besty Jones, his wife. On said 28th day of March, 1862, for a valuable consideration, Thomas Jones, for himself and as attorney-in-fact for the said Betsy Jones, his wife, by a good and sufficient deed, conveyed the above-described tract of land to one Edward Eldridge, which said deed was duly acknowledged and placed upon the records of said Whatcom county and Territory of Washington. The alleged power of attorney from Betsy Jones to Thomas Jones was not recorded and could not be and has not been found. In the acknowledgement in the deed, however, from Thomas and Besty Jones to Eldridge the officer who took the acknowledgement certified that the power of attorney from Betsy Jones to Thomas Jones for the sale of said land was at that time exhibited to him. The plaintiff, The Bellingham Bay Land Company, claims to have succeeded by chain of mesne conveyances to the title of the said Thomas Jones
352 and Betsy Jones to the land in controversy, and the validity of the said mesne conveyances is not called in question. On the 17th day of May, 1891, certain persons, claiming to be heirs of Betsy Jones, deeded to appellant, Carmi Dibble, the east half of the said donation claim, so that both parties to the action acknowledged Betsy Jones as the common source of title. The deeds of appellant were recorded in May, 1891, and are alleged to be clouds on the title of respondent. An action to remove said clouds was brought in the court below, which rendered judgment in favor of respondent.

It is agreed that both Thomas Jones and Betsy Jones had died before the commencement of this action. The proof of two facts was attempted by the respondent, the establishment of either of which would be fatal to appellant's claim. The facts attempted to be proven were as follows: (1) That plaintiff's title to the land in controversy had been acquired by adverse possession; (2) that Betsy Jones had executed a power of attorney to her husband, Thomas Jones, authorizing him to sell the disputed premises. We will notice the first proposition. It is claimed at the outset by the appellant that under the pleadings as framed no testimony tending to prove adverse holding is admissible. The language of the complaint in this respect is that "the plaintiff and its grantors have

been in actual, open, and notorious possession of the said property continuously since the 28th day of March, 1862, under color and claim of title; that neither the defendant or his ancestors or predecessors had been seized or possessed of the premises in question or any part or parcel thereof within more than ten years before the date of the commencement of this suit." We think there is nothing in appellant's objection.

353 There is no question but that the possession must be adverse, and that the adverseness of the possession is the essential ingredient that ripens into title, and that without that element the statute would not run. But there are certain facts which must be pleaded and proven before the legal conclusion of adverse holding can be announced. It is for the witnesses to testify what the character of the possession was, and from such testimony the legal conclusion is deduced by the court. It is true that some of the text writers, in defining a possession that would bar the title of the legal owner, enumerate five elements of possession, which must coexist, viz: (1) Hostile or adverse, (2) actual, (3) visible, notorious, and exclusive, (4) continuous, (5) claim or color of title, and yet it is clear that the four last-mentioned acts simply constitute and are necessary to constitute adverse possession.

Said the court in Taylor's Devisees *v.* Burnside, 1 Grattan's Reports, 165: "When we look to the elements of an adversary possession in reference to conflicting claims and the statutory prescriptive bar we find it to consist of an exclusive, actual, continued possession under a colorable claim of title." And such is the accepted doctrine of all the cases. To show conclusively that adverseness is universally regarded as a question of law and not of fact, the books proceed to discuss the circumstances under which possession would be held to be adverse or otherwise, as, for instance, it is held that possession will not be adverse if it be held under or subservient to a higher title.

In 1st Amer. & Eng. Enc. of Law, 229, cited by appellant on this point, it is held that when a purchaser of lands under
354 an executory contract is let into possession, not having paid the purchase-money and not having received a conveyance, he holds in subordination to the title of the vendor, and his possession is therefore held not to be adverse. Where, however, the vendee has executed his part of the agreement by payment of the purchase-money his possession is from that time adverse to the vendor, so that the question of adverseness is plainly a question of law instead of fact. We think, especially under the provisions of our code, which require only a plain and concise statement of facts constituting a cause of action, that the complaint is sufficient, and, even if it were not, this court has repeatedly held that in equity causes, where the whole cause was before it, that in the interests of justice it would consider all amendments made to the pleadings that could have been made in the court below; nor can it work any hardship or surprise in this case, as suggested by the appellant in his reply brief, for the case was tried upon the theory of adverse possession, and the appellant has been industrious in preparing his

defense to that proposition to the extent of having surveys made to show that the cabin which the plaintiff testified to have taken possession of was not on the land in controversy.

With this view of the sufficiency of the complaint the pertinent question, then, is, Did the plaintiff establish his title to the land in controversy by adverse possession during the statutory period? After careful investigation of all the evidence we think this question must be answered in the affirmative. We have examined all the authorities cited by both appellant and respondent upon
355 this point, as well as all the other authorities that were available, and must admit that there is a great lack of uniformity of views upon this subject. It is generally conceded, however, and this must be true from the very nature of things, that no specific rule can be laid down for the government of every case of this kind, but that each case must be governed by the circumstances surrounding it. It must be conceded at the outset that the hostile possession must be continuous and notorious, and that it cannot be made out by inference, as the presumption is in favor of the true owner. It must be exclusive, for where there are two in possession, one with and the other without title, the law will ascribe the possession to him who has the right. It must be continuous, for so soon as the adverse possession ceases the constructive seizen incident to the better title is renewed. It must, of course, be under claim or color of title, or it would not ripen into title. But admitting all these propositions in favor of appellant, we think the respondent's claim is established.

It is well established and, in fact, not denied that Eldridge entered into possession under the highest claim of title, viz., a warranty deed from the owners, and there is no question of subordination or subserviency to a higher title in the case. The contract was an executed contract. The ouster of the legal seizen was complete according to the undisputed testimony of Eldridge. It was not a mere trespass, for under color or claim of title Eldridge, after having received the deed and on the same day, took possession of the land. Not a constructive possession, but a *pedis possessio*, an actual entry and possession in fact. Eldridge's testimony on this
356 point was as follows:

"When I received the deed from Thomas Jones I asked him to go with me and show me what there was. I went with him. We went in the house where he had lived while he was perfecting the title. He showed me the amount of improvements and walked over the premises and gave me possession of the property and turned it over to me, and I believe my right to it has never before been questioned by any one."

It is true that the improvements spoken of were supposed to be on the west half of the claim, the portion belonging to Thomas Jones, but, outside of the question of constructive possession of the whole claim by the actual possession of any portion of it, the witness was testifying to the whole claim purchased of three hundred and twenty acres; and afterwards on cross-examination he testified positively that Jones and he on the day he took possession went all over the

claim. The day after the deed was executed it was filed for record in the proper recording office, and while this was, of course, only constructive notice, it has a tendency to show the openness of the transaction on the part of the grantee.

There having been, then, an actual taking under a claim of title, was the possession notorious, exclusive, and continuous? If there was any possession at all it was exclusive, for there is no pretense of any possession or claim of any kind by Betsy Jones or her heirs or by any one excepting Eldridge and his grantees for nearly thirty years. If it was a possession at all it was continuous, for the same authority was exercised by Eldridge and his grantees during all these years. That it was open and notorious cannot be doubted, as from the testimony Eldridge was generally recognized in the neighborhood as the owner of the land. When any one wanted to live on the land or wanted to cut timber or to do anything whatever with or concerning the land they came to Eldridge for permission. He time and again gave permission to various persons to cut shingle timber on the land, and sold and disposed of timber to be used as props to the coal company and to individuals. It is true that this land was not fenced or cultivated; it is true that Eldridge did not live on the land, but it is equally true that he continuously exercised authority over it. According to the testimony, the land in question was densely timbered at the time it was purchased, and for many years afterwards it was chiefly valuable for its timber, and it was in regard to the disposition of the timber that Eldridge was most frequently called upon to exercise acts of authority and ownership.

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It was said by the Supreme Court of the United States, in U. S. *v.* Arredondo, 6 Peters, 691, that neither actual occupation, cultivation, or residence are necessary to constitute actual possession. This doctrine was again announced by the Supreme Court of the United States in Ellicott *v.* Pearl, 10 Peters, 412. There the court said that an actual residence or an actual inclosure was an act presumptive of an intention to assert an ownership and possession over the property, but that there were many other acts equally evincive of such an intention. In that case the court also decided that an entry into possession of a tract of land under a deed containing metes and bounds gave a constructive possession of the whole tract.

Again, the same court, in Ewing *v.* Burnett, 11 Peters, 41, lays down the rule:

"It suffices for this purpose that visible and notorious acts of ownership are exercised over the premises in controversy for the statutory period after an entry under claim and color of title. So much depends on the nature and situation of the property, the uses to which it can be applied or to which the owner or claimant may choose to apply it, that it is difficult to lay down any precise rule adapted to all cases, but it may with safety be said that where acts of ownership have been done upon the land, which from their nature indicate a notorious claim of property in it and are continued for twenty-one years, with the knowledge of an adverse claimant, without interruption or an adverse entry by

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him for twenty-one years, such acts are evidence of ouster of a former owner and an actual adverse possession against him, if the jury shall think that the property was not susceptible of a more strict and definite possession than had been taken and held, when the property is so situated as not to admit of any permanent, useful improvement, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right and would not exercise over property which he did not claim."

In that case the land in controversy was a lot, and its principal use and value was in its convenience of digging sand and gravel for the inhabitants. Mr. Justice Baldwin, in delivering the opinion of the court in reviewing the acts constituting adverse possession, thus recounts them:

"He paid taxes upon this lot from 1810 until 1834, inclusive, and from the date of the deed from Symmes until the trial plaintiff claiming it as his own. During this time he also claimed the exclusive right of digging and removing sand and gravel from the lot, giving permission to some, refusing it to others. He brought actions of trespass against those who had done it, and at different times made leases to different persons for the purpose of taking sand and gravel therefrom, besides taking it for his own use as he pleased."

The court *led* that the circumstances testified to as related were sufficient to warrant the jury in finding in favor of adverse possession. In speaking of some of these circumstances the court says:

"These circumstances would seem to have been alluded to to
359 show the intention with which the acts previously referred to were done, in which view they were important, especially the uninterrupted payment of taxes on the lot for twenty-four successive years, which is powerful evidence of a claim of right to the whole lot."

We think the case at bar, while very similar in many respects, is a stronger case for respondent than the case of Ewing *v.* Burnett. It is true in this case Eldridge had not brought any actions of trespass against any one, but the facts seem to be from the testimony that his claim to the land was so commonly known and so universally respected and undisputed that no one ever ventured upon the land without first having obtained his consent. He had paid the taxes regularly for twenty-eight years; had exercised just such acts of ownership over the land as any man would exercise over similar land upon which he did not live. So far as the appellant Dibble is concerned, while it may not strictly affect the legal question involved, yet he was aware of Eldridge's reputed ownership of the land, having accepted a deed from him for a portion of the land prior to the purchase by him of the rights of the alleged heirs, so that his claim is merely a technical one, which does not appeal very strongly to the equity side of the court. We think the testimony as a whole sufficiently shows acts of possession over the particular land in controversy to warrant the findings of the lower court on this point; and, without further reviewing the many authorities

cited, so decide. This renders an investigation of the second proposition discussed unnecessary. The judgment is affirmed.

DUNBAR, *J.*

We concur.

ANDERS, *C. J.*
STILES, *J.*

I concur in the result.

HOYT, *J.*

360 In the Supreme Court of the State of Washington.

THE BELLINGHAM BAY LAND COMPANY, Respondent, *vs.* CARMI DIBBLE, Appellant. } No. 563. Judgment.

SATURDAY, *September* 17, 1892.

This cause having been heretofore submitted to the court on the transcript of the record of the superior court of Whatcom county, and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises, and having filed its opinion in writing, it is now, on this 17th day of September, A. D. 1892, on motion of H. Y. Thompson, Esquire, of counsel for respondent, considered, adjudged, and decreed that the judgment of the said superior court be, and the same is hereby, affirmed with costs, and that the said Bellingham Bay Land Company have and recover of and from the said Carmi Dibble the costs of this action, taxed and allowed at 75 & no 100 dollars, and that execution issue therefor; and it is further ordered that this cause be remitted to the superior court for further proceeding in accordance with the opinion herein filed.

(Page 56, 2nd vol., Journal.)

361 In the Supreme Court of the State of Washington.

THE BELLINGHAM BAY LAND COMPANY, Respondent, *vs.* CARMI DIBBLE, Appellant. } No. 563. Order.

SATURDAY, *December* 10, 1892.

This cause coming on to be heard by the court on the petition for a rehearing herein, and the court having fully considered the same and being fully advised in the premises, now orders that said petition be, and the same is hereby, denied.

(Page 156, vol. 2, Journal.)

362 In the Supreme Court of the State of Washington.

BELLINGHAM BAY LAND COMPANY, Respondent, v. CARMI DIBBLE, Appellant. } Certificate of Questions Raised.

This is to certify that I, T. J. Anders, am the duly elected, qualified, and acting chief justice of the supreme court of the State of Washington, and sat as such in the above-entitled action at its hearing and decision in the said supreme court, it being the court of last resort in the above-entitled action in the State of Washington, and that in the above-entitled action in the trial by the court below and on the appeal to this court, and at the hearing of the above-entitled action before the above-entitled court by the pleadings originally filed, the evidence introduced, the objections made, and the exceptions taken to the introduction of the evidence, and the ruling and decision of the court, and in the briefs and arguments of the attorneys of Carmi Dibble, the above-named appellant, in the regular and proper manner, as by the rules of practice and the statutes in this State is provided on appeals of causes of this character, to wit, equity causes to this court the following question was duly and regularly raised, to wit: Whether a power of attorney alleged
363 to exist and to have been made by Betsy Jones to her husband, Thomas Jones, prior to the 28th day of March, A. D. 1862, and a deed executed under it to Edward Eldridge on the 28th day of March, A. D. 1862, which said power of attorney and deed, on the respective dates of the execution thereof, were absolutely void, were made valid and effective by the retrospective portion of section 1447 of volume one of Hill's Code of this State, said power of attorney and said deed being the power of attorney referred to in the decree of the court below and the deed referred to therein as passing title from Betsy Jones to Edward Eldridge, and known on the record as Plaintiff's Exhibit "B," and that it was urged in the regular manner and in proper form at the hearing of the above-entitled action before this court, on the record, in accordance with the rules and practices of this State in such case made and provided; that the upholding and supporting of the said code section in its retrospective effect as valid and binding, as applied to the said power of attorney and said deed, were in conflict with that part of section one of the fourteenth amendment of the Constitution of the United States, which provides "That no State shall make or enforce any law which shall abridge the privileges or immunities of any citizen of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction equal protection of the law."

And I do further certify that this court did affirm the whole of the decree of the court below, but did not express any written
364 opinion on the question so raised as aforesaid, except such as is necessarily involved by the decree of this court in the

above-entitled action, dated on the seventeenth day of September, A. D. 1892, and affirming the whole of the decree of the superior court of Whatcom county, State of Washington, in the above-entitled action, entered and filed in the office of the clerk of the said superior court on the 20th day of February, A. D. 1892; and such opinion as is expressed by the statement of this court in its written opinion in the above-entitled action, that the color of title necessary to support a claim by adverse possession in respondent, The Bellingham Bay Land Company, rests and depends solely upon a warranty deed from the owner, Betsy Jones, executed by her husband, Thomas Jones, by virtue of the power of attorney urged and alleged by respondent to have been made valid by the retrospective part of the said code section; which said statement, as set forth in the opinion of this court, is an integral and necessary part of the decision by this court rendered in affirming the said decree of the lower court.

Jan. 2, 1893.

T. J. ANDERS,
Chief Justice of the Supreme Court of the State of Washington.

(Endorsed:) No. 563. Bellingham Bay Land Co., respondent, *vs.* Carmi Dibble, appellant. Certificate of questions raised. Filed Jan. 5, 1893. C. S. Reinhart, clerk.

365 In the Supreme Court of the United States.

BELLINGHAM BAY LAND COMPANY, Defendant in Error,
vs.
CARMI DIBBLE, Plaintiff in Error.
} Assignment of Errors.

Of October term, in the year of our Lord one thousand eight hundred and ninety-two.

And now, to wit, on this — Monday of ——, in the same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the plaintiff in error, by Alfred L. Black & E. B. Leaming, his attorneys, and says that in the records and proceedings aforesaid and in the giving of the judgement aforesaid there is manifest error, in this, to wit:

1st. That by the said records and proceedings and by the certificate of the chief justice of the supreme court of the State of Washington it appears that such judgement was made against the said plaintiff in error and in favor of the validity of a statute of the State of Washington, to wit, section 5 of an act of the legislature of the Territory of Washington, entitled "An act relating to
366 the conveyance or other disposition of the property of married persons," approved February 2nd, 1888, and ratified and adopted by section 2, article 27, of the constitution of the State of Washington, and now section 1447 of volume 1 of Hill's Code of the State of Washington, the validity of which statute and each and

every part thereof was drawn in question in the said record and proceedings by plaintiff in error, on the grounds of the said statute and each and every part thereof being repugnant to the Constitution and laws of the United States, as set out in section 1 of the amendment of said Constitution, in that the effect of the execution and of the sustaining of the said statute would be to deprive the said plaintiff in error of his property without due process of law; all of which was done by said court in sustaining the superior court of Whatcom county, State of Washington, in his order and ruling by which he overruled the demurrer of the plaintiff in error to the said amended complaint, and in this, to wit:

2nd. That by the said records and proceedings and by the certificate of the chief justice of the supreme court of the State of Washington it appears that such judgment was made against the said plaintiff in error and in favor of the validity of a statute of the State of Washington, to wit, section 5 of an act of the legislature of the Territory of Washington, entitled "An act relating to the conveyance or other disposition of the property of married persons," approved February 2nd, 1888, and ratified and adopted by section 2, article 27, of the constitution of the State of Washington, and now section 1447 of volume 1 of Hill's Code of the State of Washington, the validity of which
367 statute and each and every part thereof was drawn in question in the said records and proceedings by plaintiff in error, on the grounds of the said statute and each and every part thereof being repugnant to the Constitution and laws of the United States, as set out in section 1 of the 14th amendment of said Constitution, in that the effect of the execution and of the sustaining of the said statute would be to deprive the said plaintiff in error of his property without due process of law; all of which was done by the court in sustaining the rulings of the superior court of Whatcom county, State of Washington, in his order overruling a motion to strike from the amended complaint filed herein such parts thereof as referred to the power of attorney from Betsy Jones to her husband, Thomas Jones, by sustaining the superior court of Whatcom county, State of Washington, in his ruling admitting the defendant in error to introduce any testimony relative to the acquiring of the title of the said described premises, known as the east one-half of the Jones donation claim, by adverse possession, and by sustaining the rulings of the superior court of Whatcom county, State of Washington, in his admission of testimony tending to establish the existence of the said power of attorney from Betsy Jones to Thomas Jones, her husband, and in sustaining the said superior court of Whatcom county, State of Washington, in his ruling in which he refused to strike all testimony introduced by the said defendant in error tending to show title by adverse possession in the said premises, and in sustaining the said superior court of Whatcom county, State of Washington, in his ruling in refusing to strike all testimony tending to show the existence of said power of attorney from the said
368 Betsy Jones to her husband, Thomas Jones, and in sustaining the said ruling of the said superior court of Whatcom

county, State of Washington, in his refusal to strike a deed executed by the said Thomas Jones, as attorney-in-fact for the said Betsy Jones, his wife, and describing the premises hereinbefore referred to, and bearing the date of the 28th day of March, A. D. 1862, which said deed was made to Edward Eldridge and appears in the transcript at page —, and all subsequent mesne conveyances from the said defendant down to the said defendant in error, and in this, to wit:

3rd. That by the said records and proceedings and by the certificate of the chief justice of the supreme court of the State of Washington it appears that such judgement was made against the said plaintiff in error and in favor of the validity of a statute of the State of Washington, to wit, section 5 of an act of the legislature of the Territory of Washington entitled "An act relating to the conveyance or other disposition of the property of married persons," approved February 2nd, 1888, and ratified and adopted by section 2, article 27, of the constitution of the State of Washington, and now section 1447 of volume 1 of Hill's Code of the State of Washington, the validity of which statute and each and every part thereof was drawn in question in the said records and proceedings by plaintiff in error on the grounds of the statute and each and every part thereof being repugnent to the Constitution and laws of the United States as set out in section 1 of the 14th amendment of said Constitution, in that the effect of the execution and of the sustain-
369 ing of the said statute would be to deprive the said plaintiff in error of his property without due process of law; all of which was done by the court by sustaining the said superior court of Whatcom county, State of Washington, in his admission of improper testimony, to wit, the deed from Betsy Jones, wife of the said Thomas Jones, to Edward Eldridge, bearing the date of March 28th, 1862, the same being illegal, and the subsequent chain of the defendant in error's title resting upon said deed, and said deed being insufficient for any purpose and for the purpose of affording a color of title, said deed being in words and figures as follows, to wit:

Thomas Jones and wife to E. Eldridge. } Deed.

This indenture, made and entered into on this 28th day of March, in the year of our Lord, one thousand eight hundred and sixty-two, in the town of Sehome, county of Whatcom, and Territory of Washington, betwixt Thomas Jones and Betsy Jones, his wife, of the said town, of the first part, and Edward Eldridge of the second part,

Witnesseth: That the said Thomas Jones and Betsy Jones, of the first part, for and in consideration of the sum of three hundred dollars, lawful money of the United States of America, to them in hand paid, the receipt whereof is hereby acknowledged, hath bargained, granted and sold, and by these presents doth bargain, grant and sell convey and confirm unto the said Edward Eldridge, of the

second part, and to his heirs, executors, administrators and
370 assigns, all and singular that certain piece or parcel of land situate, lying and being on the north side of Bellingham bay, known as Jones' claim, and more particularly described as follows:

Commencing at a stake on the line between section- 29 & 32, in township 38, north range 3 east, the same being 12.80 chains east of post corner to sections 29 and 30, 31 & 32, thence running east 23.20 chains to another stake in a mound of stone; thence south 45.30 chains to a post; thence west 84 chains (crossing) the line between sections 31 & 32 at a distance of 36 chains, intersecting said section line at 5.45 chains south of the qu'r-sec. corner to another post; thence N. 34.20 chains to another post on the south line of E. C. Fitzhugh claim; thence east along said line 20.50 chains to the southeast corner of E. C. Fitzhugh claim; thence N. 2.07 chains to the S. W. corner of Wm. Utter's claim to another post; thence with the south — of said Wm. Utter's claim 40.27 chains, crossing the section line between sections 31 & 32 at 27.47 chains, 9.34 chains south of the post corner to sec. 29, 30, 31 & 32 to the post at the S. E. corner to said Utter's claim; thence north 9.30 chains to the place of beginning, containing 320 acres (more or less) together with all the tenements, hereditaments and appurtenances thereunto belonging, and all the rents, profits, and issues reversions and remainders, together with the estate, title and interest of the said Thomas and Betsy Jones, to the said premises or any part thereof forever.

In testimony whereof we have hereunto set our hands and seals this day above written.

371 THOMAS his x mark. JONES. [SEAL.]

BETSY JONES, [SEAL.]

By her attorney-in-fact, THOMAS his x mark. JONES.

Signed — seal-d in presents of—

WILLIAM SMITH.
H. C. BARKHOUSEN.

Acknowledgement to Foregoing Deed.

TERRITORY OF WASHINGTON, } ss:
County of Whatcom, }

Personally appeared before me, auditor in and for Whatcom county, Thomas Jones, to me well known to be the person who executed the foregoing deed, and acknowledged the execution thereof to be his own free act and deed for the uses and purposes therein specified, and likewise produced a power of attorney from Betsy Jones, his wife (at present a non-resident of this Territory), authorizing him to sell and convey her real estate, and stated that in ac-

cordance therewith he had executed the foregoing deed in her behalf for the uses and purposes therein specified.

Given under my hand and seal this 28th day of March, A. D. 1862.

H. C. BARKHOUSEN,
Auditor in and for Whatcom County.

Filed for record Marcy 28th, 1862.
Recorded Aprile 4th, 1862.

H. C. BARKHOUSEN, *Recorder.*

And in this, to wit:

372 4th. That by the said records and proceedings and by the certificate of the chief justice of the supreme court of the State of Washington it appears that such judgement was made against the said plaintiff in error and in favor of the validity of a statute of the State of Washington, to wit, section 5 of an act of the legislature of the Territory of Washington entitled "An act relating to the conveyance or other disposition of the property of married persons," approved February 2nd, 1888, and ratified and adopted by section 2, article 27, of the constitution of the State of Washington, and now section 1447 of volume 1 of Hill's Code of the State of Washington, the validity of which statute and each and every part thereof was drawn in question in the said records and proceedings by the plaintiff in error on the grounds of the statutes and each and every part thereof being repugnent to the Constitution and laws of the United States as set out in section 1 of the 14th amendment of said Constitution, in that the effect of the execution and of the sustaining of the said statute would be to deprive the said plaintiff in error of his property without due process of law; all of which was done by the court in affirming the ruling and decree of the said superior court of Whatcom county, State of Washington, upon the fact and upon the law in finding the title to the said lands to be in the said defendant in error and entering judgement against the plaintiff in error for the costs.

5th. And in this, to wit, that by the said records and proceedings and by the certificate of the chief justice of the supreme court of the State of Washington it appears that such judgement was made

373 against the said plaintiff in error and in favor of the validity of a statute of the State of Washington, to wit, section 5 of an act of the legislature of the Territory of Washington entitled "An act relating to the conveyance or other disposition of the property of married persons," approved February 2nd, 1888, and ratified and adopted by section 2, article 27, of the constitution of the State of Washington, and now section 1447 of volume 1 of Hill's Code of the State of Washington, the validity of which statute and each and every part thereof was drawn in question in the said records and proceedings by the plaintiff in error on the grounds of the statute and each and every part thereof being repugnent to the Constitution and laws of the United States as set out in section 1 of the 14th amendment of said Constitution, in that the effect of the execution and of the sustaining of the said statute would be to deprive the

said plaintiff in error of his property without due process of law; all of which was done by the court in sustaining, both upon the facts and upon the law, the said superior court of Whatcom county, State of Washington, in finding, establishing, and decreeing valid the said power of attorney from Betsy Jones to her husband, Thomas Jones; and in this, to wit:

6th. That by the said records and proceedings and by the certificate of the chief justice of the supreme court of the State of Washington it appears that such judgement was made against the said plaintiff in error and in favor of the validity of a statute of the State of Washington, to wit, section 5 of an act of the legislature of the Territory of Washington entitled "An act relating to the conveyance or other disposition of the property of married persons,"
374 approved February 2nd, 1888, and ratified and adopted by section 2, article 27, of the constitution of the State of Washington, and now section 1447 of volume 1 of Hill's Code of the State of Washington, the validity of which statute and each and every part thereof was drawn in question in the said records and proceedings by the plaintiff in error on the grounds of the statute and each and every part thereof being repugnent to the Constitution and laws of the United States as set out in section 1 of the 14th amendment of the said Constitution, in that the effect of the execution and of the sustaining of the said statute would be to deprive the said plaintiff in error of his property without due process of law; all of which was done by the court in sustaining the findings, conclusions, and decrees of the said superior court of Whatcom county, State of Washington, both upon the facts and upon the law, in finding that the plaintiff in error had no title to the said lands; and in this, to wit:

7th. In refusing to decide the said case upon its legal merits and upon the issues as raised by the pleadings in the said cause and deciding said case upon the supposed equity involved in said record; and in this, to wit:

8th. That by the said record and proceedings and the certificate of the chief justice of the supreme court of the State of Washington it appears that said judgement was made against said plaintiff in error and against the validity of an authority exercised under the United States, to wit:

The right, title, and authority claimed by the said plaintiff in error and by virtue of the Constitution and the laws of the
375 United States and the laws of the late Territory of Washington in accordance therewith as all thereof existed and were in force prior to and at the time of the admission of the State of Washington into the Union to have, own, use, possess, and enjoy without hinderance all of that portion of the lands of the said plaintiff in error mentioned and described in the amended complaint, shown in said records and proceedings as being the east half of the Jones donation claim, and to have, maintain, use, occupy, possess, and enjoy said property in the said record and proceedings heretofore referred to as acquired by virtue of the right and authority as aforesaid, to wit, by virtue of a patent of the United States bearing date on the sixth day of September, 1871, to one Betsy Jones and

held by the above plaintiff in error by conveyance from the heirs of the said Betsy Jones; and in this, to wit:

9th. That by the said record and proceedings it appears that said judgement was given against the said plaintiff in error and in favor of the validity of a statute of the State of Washington, to wit, section 26 of the Code of 1881 of the Territory of Washington, ratified and adopted by the constitution of the State of Washington by section 2, article 27, and now section 112, volume 2, of Hill's Code of the State of Washington, the validity of which statute and each and every part thereof was drawn in question in said record and proceedings by the said plaintiff in error on the grounds of said statute and each and every part thereof being repugnent to the Constitution and laws of the United States in that the effect of the execution and
376 the sustaining of said statute would be to deprive the said plaintiff in error of his property without due process of law, in conflict with section 1 of the 14 amendment of the Constitution of the United States, in that the right and title to the said premises in the said amended complaint, to wit, the east half of the Jones donation claim, was acquired by plaintiff in error from Betsy Jones by virtue of a patent of the United States dated September 6, 1871, at a time and date in which, under the laws of the United States and Washington Territory, the period or space of twenty years was requisite to the acquiring of a title by occupancy or adverse possession, as against the right and authority given by the said United States to the said Betsy Jones, and that this action was brought and commenced on the 9th day of June, 1891, less than the said twenty years—

Whereas by the laws of the land said judgement ought to have been given for the said plaintiff in error and in favor of the validity of the said authority exercised under the United States and against the validity of the said statutes and each thereof of the State of Washington and against the validity of the said authority exercised under the State of Washington and in favor of the said plaintiff in error for the quieting of the title of the said east half of the Jones donation claim mentioned in the said record and proceedings.

And said plaintiff in error prays that the judgement aforesaid for the errors aforesaid and other errors in the record and pro-
377 ceedings first aforesaid may be reversed, annulled, and altogether held for nothing, and that the said plaintiff in error may be restored to all things which he has lost by occasion of the said judgement.

ALFRED L. BLACK,
E. B. LEAMING,
Attorneys and of Counsel with Plaintiff in Error.

377½ [Endorsed:] 563. Bellingham Bay Land Co. *vs.* Carmi Dibble. Assignment of errors. Filed Feb. 28, 1893. C. S. Reinhart, clerk.

378 In the Supreme Court of the State of Washington.

BELLINGHAM BAY LAND COMPANY, Respondent, *v.* CARMI DIBBLE, Appellant. } No. 563. Petition for Allowance of Writ of Error, &c.

To the Honorable R. O. Dunbar, chief justice of the supreme court of the State of Washington:

Now comes Carmi Dibble, the above-named appellant in this court, and petitions the honorable chief justice of this court for the allowance of a writ of error from the Supreme Court of the United States to this court to bring up for review by the Supreme Court of the United States the judgement of this court in the above cause rendered and entered herein under date of the seventeenth day of September, A. D. 1892, whereby this court adjudged and directed that the judgement and decree of the superior court of Whatcom county, State of Washington, in the said cause must be affirmed, and for an order fixing the amount of the security to be filed that the plaintiff in error, said Carmi Dibble, shall prosecute his said writ of error to effect, and if he fail to make his plea good shall answer and
379 pay all costs arising or growing out of said writ of error, and for the allowance of a citation to the adverse parties, to wit, to the Bellingham Bay Land Company, upon the filing of such writ of error in this court and upon the approval and filing of the said security in pursuance of the statute of the United States in such cases made and provided.

This petition is based upon the fact that in this cause there is drawn in question the validity of a statute of the United States and the decision of the said judgement and decree of the supreme court of the State of Washington herein is against its validity and adverse to this petitioner; and also upon the fact that in this cause there is drawn in question the validity of an authority exercised under the United States, and that the decision of the said judgement of the supreme court of the State of Washington herein is against its validity and adverse to this petitioner; and also upon the fact that in this cause there is drawn in question the validity of a statute of the State of Washington, on the grounds of it being repugnant to the Constitution and laws of the United States, and the decision in said judgement of the supreme court of the State of Washington herein is in favor of its validity and adverse to this petitioner; and also upon the fact that in this cause there is drawn in question the validity of an authority exercised under the State of Washington, on the grounds of it being repugnant to the Constitution and laws of the United States, and the decision in said judgement of the supreme court of the State of Washington herein is in favor of its validity and adverse to this petitioner; and also upon the fact that in
380 this cause there is drawn in question and a title, right, and privilege are claimed under the Constitution and statutes of and under authorities exercised under the United States and the

decision in said judgement of the supreme court of the State of Washington herein is against such title, right, and privilege especially set up and claimed by this petitioner under said Constitution and statutes of and authorities exercised under the United States; and your petitioner will ever pray, &c.

Dated February 28th, A. D. 1893.

ALFRED L. BLACK,
E. B. LEAMING,
Attorneys for and of Counsel with Carmi Dibble, Appellant in this Court.

381 In the Supreme Court of the State of Washington.

BELLINGHAM BAY LAND COMPANY, Respondent, v. CARMI DIBBLE, Appellant. } No. 563. Order Allowing Writ of Error.

FEBRUARY 28TH, 1893.

Carmi Dibble, the above-named appellant in this court, having this day filed his petition in writing to the honourable chief justice of the supreme court of the State of Washington for the allowance of a writ of error from the Supreme Court of the United States to this court to bring up for review by the Supreme Court of the United States the judgement of this court in the above-entitled cause rendered and entered herein under date of seventeenth day of September, A. D. 1892, and for an order fixing the amount of the security to be filed that the plaintiff in error, said Carmi Dibble, shall prosecute his said writ of error to effect, and if he fail to make his plea good shall answer all costs thereon in the Supreme Court of the United States, and for the allowance of a citation upon the filing of such writ of error in this court and upon the approval and filing of such security in pursuance of the statute in such case made and provided, and the undersigned having duly considered said matter and being fully advised in the premises, now, on motion of the said appellant's attorneys, it is ordered that said writ of error be, and the same is hereby, allowed; that the amount of security to be given as aforesaid be, and the same is hereby, fixed at the sum of one
382 thousand dollars, said plaintiff in error having elected to file security such that said writ of error shall not operate as a supersedeas, and that such security be conditioned that the plaintiff in error, said Carmi Dibble, shall prosecute said writ of error to effect, and if he fail to make his plea good shall answer all costs of said writ of error and proceedings, and that the form of such security and the sureties thereon be approved before filing the same by the undersigned, the honorable chief justice of this court, and that upon the issuing and filing of the said writ of error and the approval and filing of such security, as aforesaid, said writ of error shall be in full force and effect, and that a citation issue thereupon to the adverse parties, to wit, to the Bellingham Bay Land Company, in pur-

suance of the statute of the United States in such case made and provided.

Done at Olympia, in the State of Washington, this 28th day of February, A. D. 1893.

R. O. DUNBAR,
Chief Justice of the Supreme Court of the State of Washington.

Vol. 2, Journal, page 240.

383 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgement of a plea which is in the said supreme court of the State of Washington, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Bellingham Bay Land Company, respondent in the said court, and Carmi Dibble, appellant in the said court, wherein was drawn in question the validity of a treaty or a statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or a statute or commission held under the United States and the decision was against the title, right, privilege, or execution specially set up or claimed under the said clause of the said Constitution, statute, treaty, or commission, and which judgement of the said supreme court of the State of Washington was rendered and entered therein in the said cause under date of September seventeenth, 1892,
384 a manifest error hath happened, to the great damage of the said Carmi Dibble, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgement therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within sixty days from the date of this writ, to wit, on May 1 next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and Constitution of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court, the fourth day of March, in the year of our Lord one thousand eight hundred and ninety-three.

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the District of Washington.

Issued March fourth, 1893.

Seal United States Circuit Court, District of Washington.

Service of a full, true, and correct copy of this writ of error is hereby admitted and acknowledged M'ch 18, 1893.

H. Y. THOMPSON,
Att'y for Bellingham Bay Land Company, Def'ts in Error.

____ ____,
Vice-President of Bellingham Bay Land Company.

385 STATE OF WASHINGTON, } ss:
County of Whatcom, }

Alfred L. Black, being first duly sworn according to law, upon his oath deposes and says: I reside in the city of New Whatcom, Whatcom county, State of Washington, and am by profession an attorney-at-law; that on March 18th, A. D. 1893, at the city of New Whatcom aforesaid, I did serve a full, true, and correct copy of the foregoing writ of error from the Supreme Court of the United States, sued out by Carmi Dibble, the plaintiff in error, to review the judgment of the supreme court of the State of Washington in the above-entitled action, on H. Y. Thompson, the attorney of record for the above-named defendant in error, The Bellingham Bay Land Company, and did, at the city of Fairhaven, county & State aforesaid, further serve on the 23 day of March, A. D. 1893, on C. X. Larrabee, the vice-president of The Bellingham Bay Land Company, the defendant in error in the above-entitled action (the president of the said company being deceased, and the vice-president, C. X. Larrabee, acting as the president of the said company), said writ, by delivering a full, true, and correct copy of the foregoing writ, by delivering the same to the said H. Y. Thompson and C. X. Larrabee, both of which services appear by the acknowledgement on the foregoing writ of error.

ALFRED L. BLACK.

Subscribed and sworn to before me this 23rd day of March, A. D. 1893.

{ Seal C. W. Dorr, Notary Public, State of Washington. }
{ Expiration of Commission, Mar. 19, 1894. }

C. W. DORR,
Notary Public for Washington, Residing at New Whatcom, Wash.

385½ [Endorsed:] 563. In the supreme court of the State of Washington. The Bellingham Bay Land Company, respondent and defendant in error, *v.* Carmi Dibble, appellant and plaintiff

in error. Writ of error from the Supreme Court of United States. Alfred L. Black, E. B. Leaming, attorneys for plaintiff in error. The within writ of error is allowed by me this March 20, 1893. R. O. Dunbar, chief justice of supreme court of the State of Washington. Filed March 24th, 1893. C. S. Reinhart, clerk.

386 The United States of America to the Bellingham Bay Land Company, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, to be holden at Washington, D. C., within sixty days from March 4th, A. D. 1893, to wit, on May 1, 1893, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Washington, at Olympia, in said State, wherein you, The Bellingham Bay Land Company, are respondent and defendant in error and Carmi Dibble is appellant and plaintiff in error, to show cause (if any there be) why the said judgement in the said writ of error *made* should not be corrected and speedy justice not be done to the party in that behalf.

Witness the Honourable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 20th day of March, A. D. 1893.

[Seal of the Supreme Court, State of Washington.]

R. O. DUNBAR,
Chief Justice of the Supreme Court of State of Washington.

Service of a full, true, and correct copy of the above citation is acknowledged M'ch 25, 1893.

H. Y. THOMPSON AND
KERR & McCORD,
Att'y. for the Defendant in Error,
The Bellingham Bay Land Company.

387 STATE OF WASHINGTON, } ss:
County of Whatcom, }

Alfred L. Black, being first duly sworn according to law, upon his oath deposes and says: I reside in the city of New Whatcom, Whatcom county, State of Washington, and am by profession an attorney-at-law; that on March 25th, A. D. 1893, at the city of New Whatcom aforesaid, I did serve a full, true, and correct copy of the foregoing citation from the Supreme Court of the United States, sued out by Carmi Dibble, the plaintiff in error, to review the judgement of the supreme court of the State of Washington in the above-entitled action on H. Y. Thompson & J. A. Kerr, the attorneys of record for the above-named defendant in error, The Bellingham Bay Land Company, and did further serve on the 25th day of March, A. D. 1893, on C. X. Larrabee, the vice-president of The Bellingham Bay Land Company, the defendant in error in the above-entitled action (the president of said company being deceased and the vice-president, C. X. Larrabee, acting as the president of said company), said citation by

delivering a full, true, and correct copy of the *foregoing citation by delivering the* same to the said C. X. Larrabee and H. Y. Thompson & J. A. Kerr, both of which services appear by the acknowledgement on the foregoing citation.

ALFRED L. BLACK.

Subscribed and sworn to before me this 25th day of March, A. D. 1893.

{ Seal Hiram E. Hadley, Notary Public, State of Washington. Expiration of Commission, Dec. 28, 1894. }

HIRAM E. HADLEY,
Notary Public for Washington, Residing at New Whatcom, Wash.

387½ [Endorsed:] 563. Supreme court of the State of Washington. Carmi Dibble, plaintiff in error, *v.* Bellingham Bay Land Company, defendant in error. Filed Apr. 3, 1893. C. S. Reinhart, clerk. A. L. Black, E. B. Leaming, attorneys for plaintiff in error.

388 In the Supreme Court of the State of Washington.

BELLINGHAM BAY LAND COMPANY, Respondent,
v.
CARMI DIBBLE, Appellant.

Bond.

Know all men by these presents that we, the above-named Carmi Dibble, of the county of Whatcom, State of Washington, as principal, and H. A. White and H. C. Bell, as sureties, of the county of Whatcom, State of Washington, are held and firmly bound unto the above-named The Bellingham Bay Land Company in the sum of one thousand dollars, to be paid to the said Bellingham Bay Land Company, its successors or assigns; for the payment of which, well and truly to be made, we do bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally and firmly, by these presents.

Sealed with our seals and dated this 1st day of March, A. D. 1893.

Whereas the above-named Carmi Dibble has prosecuted a writ of error for an appeal to the Supreme Court of the United States to reverse the decision and judgment rendered in the above-entitled action by the supreme court of the State of Washington, which judgment was rendered and entered in said last-named court on September 17th, A. D. 1892:

Now, therefore, the condition of this obligation is such that if the said above-named Carmi Dibble shall prosecute said writ of
389 error to effect and if he shall fail to make his plea good shall

answer all costs arising thereon, then this obligation to be void; otherwise to remain in full force and virtue.

CARMI DIBBLE. [SEAL.]
H. A. WHITE. [SEAL.]
H. C. BELL. [SEAL.]

Signed, sealed, and delivered in the presence of—
ALFRED L. BLACK.
J. K. CHAMBERS.

STATE OF WASHINGTON, } ss:
County of Whatcom, }

H. A. White and H. C. Bell, being first duly sworn according to law, upon their oaths each for himself says: I am one of the persons named in and who signed and sealed the foregoing bond as a surety. I am a resident and freeholder of the State of Washington and am not a counselor at-law, sheriff, clerk of the superior court of said State, or other officer of said court. I am worth the sum specified in the foregoing bond, to wit, the sum of one thousand dollars, over and above all debts and liabilities and exclusive of property exempt from execution.

H. A. WHITE.
H. C. BELL.

Subscribed and sworn to before me this 1st day of March, A. D. 1893.

ALFRED L. BLACK,
Notary Public for Washington, Residing at New Whatcom.

390 On reading and filing the foregoing bond, and upon motion of the above-named appellant's attorneys, it is ordered that said bond, both as to the form thereof and the security thereon, be approved, and that the same is hereby approved, and that upon the filing of the said bond said writ of error shall be in force and operation in the above-entitled action.

Done at Olympia, in the State of Washington, on this — day of March, A. D. 1893.

R. O. DUNBAR,
Chief Justice of the Supreme Court of the State of Washington.

Service of copy of the within bond is hereby acknowledged this M'ch 10, 1893.

H. Y. THOMPSON,
Att'y for Bellingham Bay Land Co.

(Endorsed:) "No. 563. In the supreme court of the State of Washington. Bellingham Bay Land Company, respondent, *v.* Carmi Dibble, appellant. Bond. Filed Mar. 16, 1893. C. S. Reinhart, clerk. Alfred L. Black, E. B. Leaming, attorneys of and of counsel with Carmi Dibble, appellant in this court."

391 In the Supreme Court of the United States.

BELLINGHAM BAY LAND COMPANY, Defendant in Error,
v.
CARMI DIBBLE, Plaintiff in Error.
} Return.

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, do hereby certify that I have compared the annexed papers with the originals on file and remaining of record in my office, and that the same are true copies thereof and of the whole of such originals, and in obedience and in conformity with the writ of error in the above-entitled suit I do hereby return to the Supreme Court of the United States a true copy of the record and of the proceedings in said cause and of the opinion of the supreme court of the State of Washington therein and of the certificate of the questions raised, certified by the chief justice of said supreme court of the State of Washington, under my hand and the seal of the said supreme court of the State of Washington, and such copies are hereunto annexed, and I do likewise hereby return and transmit

392 to the Supreme Court of the United States said original writ of error, the original citation issued thereon, the original acknowledgements and proof of the service of said writ of error and citation and of the bond filed thereon, and the original assignment of errors filed in my office by the plaintiff in error herein.

In testimony whereof I have hereunto subscribed my name and affixed said official seal, at Olympia, in the State of Washington, this 18th day of April, 1893.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

[Endorsed:] In the Supreme Court of the United States. Bellingham Bay Land Company, defendant in error, *v.* Carmi Dibble, plaintiff in error. Return. ——, ——, attorneys of plaintiff in error.

Endorsed on cover: Case No. 15,308. Washington supreme court. Term No., 230. Carmi Dibble, plaintiff in error, *vs.* The Bellingham Bay Land Company. Filed April 28th, 1893.

IN THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1895.

CARMI DIBBLE, *Plaintiff in Error,*

vs.

THE BELLINGHAM BAY LAND COMPANY,

Defendants in Error.

} No. 230.

Error to the Supreme Court of the State of Washington.

STATEMENT AND BRIEF FOR PLAINTIFF IN ERROR.

ALFRED L. BLACK,
E. B. LEAMING,
Attorneys for Plaintiff in Error.

Filed this ..... *day of* ..... *A. D.*

391 In the Supreme Court of the United States.

BELLINGHAM BAY LAND COMPANY, Defendant in Error,
vs. } Return.
CARMI DIBBLE, Plaintiff in Error.

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, do hereby certify that I have compared the annexed papers with the originals on file and remaining of record in my office, and that the same are true copies the record and of the whole of such originals, and in obedience and in conformity with the writ of error in the aforeentitled suit I do hereby return to the Supreme Court of the United States a true copy of the record and of the proceedings in said cause and of the opinion of the supreme court of the State of Washington, the seal and of the certificate of the questions raised, certified by the chief justice of said supreme court of the State of Washington, under my hand and the seal of the said supreme court of the State of Washington, all which copies are hereunto annexed, and I do likewise hereby return and transmit to the Supreme Court of the United States said original writ
392 of error, the original citation issued thereon, the original acknowledgements and proof of the service of said writ of error and citation and of the bond filed thereon and the original assignment of errors filed in my office by the plaintiff in error herein.

In testimony whereof I have hereunto subscribed my name and affixed said official seal, at Olympia, in the State of Washington this 18th day of April, 1893.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk*.

[Endorsed:] In the Supreme Court of the United States. Bellingham Bay Land Company, defendant in error, *vs.* Carmi Dibble, plaintiff in error. Return. ——, ——, attorneys of plaintiff in error.

Endorsed on cover: Case No. 15,305. Washington supreme court. Term No. 230. Carmi Dibble, plaintiff in error, *vs.* The Bellingham Bay Land Company. Filed April 28th, 1893.

Office Supreme Court U. S.
FILED.
JAN 30 1896
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1895.

CARMI DIBBLE, *Plaintiff in Error,*
vs.
THE BELLINGHAM BAY LAND COMPANY,
Defendants in Error.
Term No. 230.

Error to the Supreme Court of the State of Washington.

STATEMENT AND BRIEF FOR PLAINTIFF IN ERROR.

ALFRED L. BLACK,
E. B. LEAMING,
Attorneys for Plaintiff in Error.

Filed this ..... day of ..... A.D. 1896.

..... *Clerk.*

IN THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1895.

CARMI DIBBLE, *Plaintiff in Error,*
vs.
THE BELLINGHAM BAY LAND COMPANY,
Defendants in Error.
} Term No. 230.

Error to the Supreme Court of the State of Washington.

STATEMENT AND BRIEF FOR PLAINTIFF IN ERROR.

ALFRED L. BLACK,
E. B. LEAMING,
Attorneys for Plaintiff in Error.

NEW WHATCOM, WASH:
SPEIRS, THE PRINTER, 1268 BAY STREET.
1896.

STATEMENT OF THE CASE.

On September 6th, 1871, the United States issued its patent under the Act of Congress commonly known as the Oregon Donation Act, and its various suplements, to one Betsy Jones, wife of Thomas Jones, for the tract of land described as the east one half of the Jones Donation Claim, it being the premises in controversy in this action.

Long prior to that date, and as early as March, 1862, a Donation Certificate had been issued to Betsey Jones for these premises, which are now situate in Whatcom County, State of Washington.

This action was originally instituted in the Superior Court of Whatcom County on June 9th, 1891, by the Bellingham Bay Land Company, now Defendant in error, against Carmi Dibble, now Plaintiff in error, and is a suit in equity to quiet the title to the land in question, in said the Bellingham Bay Land Company and remove certain alleged clouds.

To the original complaint a motion was interposed by the plaintiff in error, and after hearing argument on the same, the trial Court sustained in part and denied in part, the questions raised.

An amended complaint was then filed by the defendant in error, in which it is alleged that defendant in

error is a corporation with power to own and hold real estate. That prior to 1862 Thomas Jones and Betsey Jones, his wife, acquired from the United States, by virtue of a settlement under the "Donation Act," a tract of land in Whatcom County, containing three hundred and twenty acres. The west half of this tract was patented to Thomas Jones and the east half to Betsey Jones. That on March 28th, 1862, for a full consideration, Thomas Jones, for himself and as attorney in fact for Betsey Jones, his wife, by deed, conveyed the whole of said premises to Edward Eldridge. That prior to the execution of said deed, Betsey Jones had executed and delivered to her husband, Thomas Jones, a power of attorney, authorizing him to convey the premises hereinbefore described. That the power of attorney was in force at the time of the execution of the deed to Eldridge, but by some oversight was never recorded, and is now lost. That by mesne conveyances defendant in error has succeeded to the title of all of said property, except a small portion thereof, and is the equitable owner and is now in possession. That defendant in error and its grantors have been in the actual possession of the said premises since the twenty-eighth day of March, A. D., 1862. That neither plaintiff in error nor his grantors have been seized or possessed of any part of the said premises within ten years last past. That plaintiff in error claims to be the owner and claims to have procured a deed for the said premises. That the claim of plaintiff in error is based on the fact that he alleges that the power of attorney herein referred to is void, and was never placed of

record. That Betsey Jones, prior to 1888, died intestate, leaving her surviving as her heirs at law Mary Lovatt, Rosanna Carter, William Hill and Mary Wilkes. That these heirs have, by deeds now of record in the office of the Auditor of Whatcom County, conveyed the premises aforesaid to plaintiff in error. That these deeds are a cloud on defendant in error's title. That defendant in error has no adequate remedy at law. That the fact that the power of attorney is not of record, and that persons claiming to be the heirs of Betsey Jones have executed deeds to plaintiff in error, are clouds on defendants in error's title. Defendant in error claims that it is entitled to a decree establishing the existence and validity of the said power of attorney and decreeing defendant in error to be the owner of said premises and to quiet the title of the same. It is also asked that plaintiff in error be decreed to have no interest in the premises. To this amended complaint plaintiff in error interposed a motion to strike all reference to the power of attorney, as immaterial and redundant. This motion was, by the Court, overruled and exception allowed. Plaintiff in error then filed a disclaimer to all of that part of the said premises known as the west half of the Donation claim patented to Thomas Jones. Plaintiff in error then filed a demurrer on the ground that the Complaint did not state facts sufficient to constitute a cause of action, which was by the Court overruled. An answer and cross-complaint by plaintiff in error was next filed, by which plaintiff in error specifically denied all of the allegations of defendant in error tending to show ownership to the

east half of the Donation Claim, patented to Betsey Jones, as well as a denial of the existence of any power of attorney; but admits and asserts plaintiff in error's claim, as set out in the complaint. The answer further denies that defendant in error has no adequate remedy at law; and denies that the alleged facts as stated by defendant in error, are clouds; and denies any right in defendant in error to have any such alleged clouds removed. By way of cross-complaint plaintiff in error avers that at all times since April 1st, 1862, until her death, Betsey Jones was the owner of the east half of the Donation Claim. That no instrument of any character except deeds hereinafter mentioned, have ever been placed of record whereby Betsey Jones, or her heirs have ever sold or encumbered said east half. That plaintiff in error innocently, and without notice of any power of attorney, for value paid, purchased from the heirs at law of Betsey Jones said east half of the Jones Donation Claim. That at the date of such purchase Betsey Jones was dead. Plaintiff in error prays to be decreed to be the owner of said east half of the Donation Claim, and for a judgment decreeing the title to be in him, as against defendant in error.

At the trial evidence was introduced by both sides, and the Trial Court made findings of fact and conclusions of law in effect sustaining the allegations of the amended complaint, as herein stated. Based on these findings and conclusions, a decree was rendered by which it was decreed that the power of attorney from Betsey Jones to her husband, Thomas Jones, be established and decreed valid. That the Bellingham Bay

Land Company be decreed the owners in fee simple and entitled to the possession of the disputed premises, and that Carmi Dibble be decreed to have no interest in the same, and that the deeds to him from the heirs of Betsey Jones be removed as clouds upon the title of the Bellingham Bay Land Company.

From the findings of fact, conclusions of law and decree Carmi Dibble appealed to the Supreme Court of the State of Washington, it being the Court of last resort in that State.

The Supreme Court of the State of Washington affirmed the whole of the decree of the Court below.

From the decree of affirmance so rendered, Carmi Dibble brings to this Court his writ of error, he raises the proposition that the Court below refused to decide the case on its legal merits and on the issues raised; and the proposition that by the decree rendered he is deprived of his property without due process of law, and in conflict with Section one of the 14th amendment to the Constitution of the United States, in that the power of attorney and deed executed under it, referred to in the foregoing statement, which were absolutely void at the time of their execution, were declared to be valid by force of a retrospective statute, viz., Section 1447, Volume I. Hill's Code, hereinafter fully set out; and the proposition that by said decree a right and privilege claimed under an authority by a patent of the United States, issued September 6th, 1871, was denied. Printed Record, page 107. And the proposition that by said decree he is deprived of his property without due process of law, and in conflict with Section one of

the 14th amendment to the Constitution of the United States, in that the validity of Section 112, Volume II., Hill's Code; as hereinafter set out, was sustained as applicable to the facts of this case. And the proposition that, in fact, no competent evidence of power of attorney and deed referred to, exists in the record, which fact is the one on which the second proposition herein named rests.

All of which propositions and questions were raised in the Trial Court of the above entitled action, and also in the Supreme Court of the State of Washington, in accordance with the practice in like cases on appeal, to-wit, in accordance with the practice of appeals in equity cases.

1st—By motion to strike out part of the amended complaint. Printed Record, page 161.

2nd—By demurrer to amended complaint. Printed Record, page 163.

3rd—By answer. Printed Record, 164.

4th—By stipulation and objections. Printed Record, pages 1 to 4.

5th—By motion to strike out testimony. Printed Record, pages 55 to 57.

6th—By plaintiff's exhibit A. Printed Record, page 107.

7th—By objections to deed, exhibit B. Printed Record, pages 2 and 3.

8th—By the pleadings. Printed Record, pages 158 to 169.

9th—By the findings of fact and conclusions of law and decree. Printed Record, pages 171 to 175.

10th—By the date of Exhibit A. Printed Record, page 107. And the date of the original complaint filed. Printed Record, page 155.

11th—By the opinion and judgment of the Supreme Court. Printed Record, pages 181 to 186.

12th—By the certificate of questions raised. Printed Record, page 187.

Plaintiff in error bases his rights on the following:

ASSIGNMENT OF ERRORS.

1st—That the Supreme Court of the State of Washington erred in sustaining the Superior Court of Whatcom County, State of Washington, in its order and ruling, by which it overruled the demurrer of plaintiff in error to the amended complaint filed in said Superior Court of Whatcom County, Washington, which demurrer was overruled by the sustaining of the validity of the statute of the State of Washington, to-wit: Section 1447 of Volume I. of Hill's Code, the validity of which said statute was drawn in question by said ruling, for the reason said statute is repugnent to Section one of the 14th amendment to the Constitution of the United States, in that it deprives the plaintiff in error from his property without due process of law.

2nd—That the Supreme Court of the State of Washington erred in its sustaining the rulings of the Superior Court of Whatcom County, State of Washington, in its order overruling a motion to strike from the amended complaint filed in the said action such parts

thereof as referred to the power of attorney from Betsey Jones to her husband, Thomas Jones; and by sustaining the said Superior Court of Whatcom County, State of Washington, in its ruling admitting the defendant in error to introduce any testimony relative to the acquiring of the title of the said described premises known as the east one half of the Jones Donation Claim, by adverse possession; and by sustaining the rulings of the said Superior Court of Whatcom County, State of Washington, in its admission of testimony tending to establish the existence of said power of attorney from Betsey Jones to her husband, Thomas Jones; and in sustaining the said Superior Court of the State of Washington, in and for Whatcom County, in its rulings in which it refused to strike all testimony introduced by the said defendant in error tending to show title by adverse possession of the said premises; and in sustaining the said Superior Court of Whatcom County, State of Washington, in its ruling in refusing to strike all testimony tending to show the existence of the said power of attorney from Betsey Jones to her husband, Thomas Jones; and in sustaining the said Superior Court of Whatcom County, State of Washington, in its refusal to strike a deed executed by said Thomas Jones, as attorney in fact of his said wife, Betsey Jones, and describing the premises hereinbefore referred to, and bearing the date of March 28th, 1862, which said deed was made to Edward Eldridge, and appears in the present record at page 12, and all subsequent mesne conveyances from the said Edward Eldridge down to said defendant in error; all of which

said rulings were made and had by the sustaining of the validity of the statute of the State of Washington, to-wit: Section 1447 of Volume I. of Hill's Code, the validity of which said statute was drawn in question by said rulings, for the reason that said statute is repugnent to Section one of the 14th amendment to the Constitution of the United States, in that it deprives the plaintiff in error from his property without due process of law.

3rd—That the Supreme Court of the State of Washington erred in sustaining the Supevior Court of Whatcom County, Washington, in its order and ruling by which it admitted improper testimony, to-wit: the deed from Betsey Jones, wife of Thomas Jones, to Edward Elridge, bearing date on March 28th, 1862, the admission of which testimony was allowed by the sustaining of the validity of a statute of the State of Washington, to-wit: Section 1447 of Volume I. of Hill's Code, the validity of which statute was drawn in question by said ruling for the reason that the said statute is repugnent to Section one of the 14th amendment to the Constitution of the United States, in that it deprives the plaintiff in error of his property without due process of law.

Said testimony and evidence, together with the subsequent chain of defendant in error's title rested upon said deed, which said deed is on its face insufficient for any purpose, and for the purpose of affording a color of title, except by virtue of the said Section No. 1447 of Volume I. of Hill's Code. Said deed being in words and figures as follows to-wit:—

"DEED.

"Thomas Jones and wife to E. Eldridge.

"THIS INDENTURE, made and entered into on this 28th day of March, in the year of our Lord one thousand eight hundred and sixty-two, in the town of Sehome, County of Whatcom, and Territory of Washington, betwixt Thomas Jones and Betsy Jones, his wife, of the said town, of the first part, and Edward Eldridge of the second part;

"WITNESSETH: That the said Thomas Jones and Betsy Jones of the first part, for and in consideration of the sum of three hundred dollars, lawful money of the United States of America, to them in hand paid, the receipt whereof is hereby acknowledged, hath bargained, granted and sold and by these presents doth bargain, grant and sell, convey and confirm unto the said Edward Eldridge of the second part, and to his heirs, executors, administrators and assigns, all and singular that certain piece or parcel of land situate, lying and being on the north side of Bellingham Bay, known as Jones Claim, and more particularly described as follows:

"Commencing at a stake on the line between section 29 and 32, in township 38, north range 3 east, the same being 12.80 chains east of post corner to sections 29 and 30, 31 and 32; thence running east 23.20 chains to another stake in a mound of stone; thence south 45.30 chains to a post; thence west 84 chains (crossing) the line between sections 31 and 32 at a distance of 36 chains, intersecting said section line at 5.45 chains south of the qur. sec. corner to another post; thence 34.20 chains to another post on the south line of E C. Fitzhugh claim; thence east along said line 20.50 chains to the south-east corner of E. C. Fitzhugh claim; thence 2.07 chains to the s.w. corner of Wm. Utter's claim to another post; thence with the south of said Wm. Utter's claim 40.27 chains, crossing the section line between sections 31 and 32 at 27.47 chains, 9.34 chains south of the post corner to section 29, 30, 31 and 32 to the post at the s. e. corner to said Utter's claim; thence north 9.30 chains to the place of beginning, containing 320 acres (more or less) together with all the tenements, hereditaments, and appurtences

thereunto belonging, and all the rents, profits and issues, reversions and remainders, together with the estate, title and interest of the said Thomas and Betsy Jones to the said premises, or any part thereof, forever.

"IN TESTIMONY WHEREOF, we have hereunto set our hands and seals this day above written.

His
"THOMAS X JONES, (Seal).
Mark.
"BETSY JONES, (Seal).
"By her attorney in fact,
His
"THOMAS X JONES.
Mark.

"Signed, *sealed* in presents of
"WILLIAM SMITH.
"H. C. BARKHOUSEN."

"ACKNOWLEDGEMENT TO FOREGOING DEED.

"Territory of Washington,
"County of Whatcom. } ss.

"Personally appeared before me, Auditor in and for Whatcom County, Thomas Jones, to me well known to be the person who executed the foregoing deed, and acknowledged the execution thereof to be his own free act and deed, for the uses and purposes therein specified, and likewise produced a power of attorney from Betsy Jones, his wife (at present a non-resident of this Territory), authorizing him to sell and convey her real estate, and stated that in accordance therewith he had executed the foregoing deed, in her behalf, for the uses and purposes therein specified.

"Given under my hand and seal this 28th day of March, A.D. 1862.

"H. C. BARKHOUSEN,
"Auditor in and for Whatcom County.

"Filed for record *Marcy* 28th, 1862.
"Recorded Aprile 4th, 1862.
"H. C. BARKHOUSEN, Recorder."

4th—That the Supreme Court of the State of Washington erred in sustaining the Superior Court of Whatcom County, Washington, by affirming the rulings and

decrees of the said Superior Court upon the facts and upon the law, and in the finding the title to the land known as the east half of the Jones Donation Claim, heretofore referred to, to be in the said defendant in error, and in entering judgment against the said plaintiff in error for costs; all of which was done by the sustaining of the validity of a statute of the State of Washington, to-wit:—Section 1447 of Volume I. of Hill's Code, the validity of which said statute was drawn in question by said rulings, for the reason that said statute is repugnent to Section one of the 14th amendment to the Constitution of the United States, in that it deprived the plaintiff in error of his property without due process of law.

5th—That the Supreme Court of the State of Washington erred in sustaining the Superior Court of Whatcom County, Washington, in its order and rulings, by which it sustained both upon the facts and upon the law, the said Superior Court of Whatcom County, State of Washington, in finding, establishing and decreeing valid the said power of attorney in the record referred to as made from Betsey Jones to her said husband, Thomas Jones; all of which was done by the sustaining of the validity of a statute of the State of Washington, to-wit:—Section 1447 of Volume I. of Hill's Code, the validity of which said statute was drawn in question by such rulings, for the reason that said statute is repugnent to the Section one of the 14th Amendment to the Constitution of the United States, in that it deprives the plaintiff in error of his property without due process of law.

6th—That the Supreme Court of the State of Washington erred in sustaining the Superior Court of Whatcom County, Washington, in its findings, conclusions, and decrees, both upon the facts and upon the law in finding that the said plaintiff in error had no title to said lands, to-wit:—the east half of the Jones Donation Claim, which said findings, conclusions and decrees were drawn in question by the sustaining of the validity of a statute of the State of Washington, to-wit:—Section 1447 of Volume I. of Hill's Code, the validity of which said statute was drawn in question by said findings, conclusions and decrees, for the reason that the said statute is repugnent to Section one of the 14th Amendment to the Constitution of the United States, in that it deprives plaintiff in error of his property without due process of law.

7th—That the Supreme Court of the State of Washington erred in refusing to decide said case upon its legal merits, and upon the issues as raised by the pleadings in the said cause, and by deciding said case upon the supposed equity involved in said record.

8th—That the Supreme Court of the State of Washington erred by deciding against the plaintiff in error and against the validity of an authority exercised under the United States to wit:—the right, title and authority claimed by said plaintiff in error, and by virtue of the Constitution and Laws of the United States and the laws of the late Territory of Washington, in accordance therewith and as therein existing, and were in force prior to and at the time of the admission of the State of Washington into the Union, to have, own, use, possess

and enjoy without hinderance all of that portion of the lands of said plaintiff in error mentioned in and claimed in the amended complaint shown in said record and proceedings as being the east half of the Jones Donation Claim; and to have, use, occupy, possess and enjoy said property as acquired by virtue of the right and authority as aforesaid, to-wit:—by virtue of a patent of the United States bearing date on the sixth day of September, A.D. 1871 to one Betsey Jones and held by the above plaintiff in error by conveyances from the heirs of the said Betsey Jones.

9th—That the Supreme Court of the State of Washington erred by deciding against said plaintiff in error and in favor of the validity of a statute of the State of Washington, to-wit:—Section 26 of the Code of 1881 of the Territory of Washington, ratified and adopted by the Constitution of the State of Washington by Section 2, Article 27, and now Section 112, Volnme II. of Hill's Code of the State of Washington, the validity of which statute was drawn in question by the said plaintiff in error on the grounds of the said statute, and each and every part thereof, being repugnent to the Constitution and Laws of the United States, in that the effect of the execution and the sustaining of said statute would be to deprive said plaintiff in error of his property without due process of law in conflict with Section 1 of the 14th, Amendment of the Constitution of the United States, in that the right and title to said premises, to-wit:—the east half of the Jones Donation Claim, was acquired by plaintiff in error from Betsey Jones by virtue of a patent of the United States

dated September 6th, A.D. 1871, at a time and date, which under the laws of the United States and the Territory of Washington, the period or space of twenty years was requisite to the acquiring of the title by occupancy or adverse possession as against the right and authority given by the said United States to the said Betsey Jones, and that this action was brought and commenced on the ninth day of June, A.D. 1892, less than said twenty years.

ALFRED L. BLACK,

E. B. LEAMING,

Attorneys and of Counsel with Plaintiff in Error.

ARGUMENT.

At the outset plaintiff in error is met with the proposition as to whether the record in this case presents a federal question that was necessarily decided against him by the State Court.

The first six assignments of error all relate to one legal proposition, viz: The validity of a power of attorney executed by Betsey Jones to her husband, Thomas Jones, prior to March 28th, 1862, and the validity of a deed executed under it on that date to Edward Eldridge.

Our contention is that these instruments were absolutely void and nullities when executed and until they were attempted to be made valid by Section 1447 of Vol. I. of Hill's Code of the State of Washington, which is in language as follows:—

"All powers of attorney heretofore made and executed by any married woman joined with her husband and duly acknowledged, and certified, and all powers of attorney heretofore made or executed by husband or wife to the other, authorizing the sale or other disposal of real estate, whether separate or community real estate, duly acknowledged, conformably with the previous sections, and all conveyances heretofore and hereafter executed under and by virtue of such power of attorney, and acknowledged and certified in the manner provided herein, shall be valid and binding: PROVIDED, that any rights vested in third persons shall not be effected by anything in this Section contained."

In the Court below the existence of the power of attorney was in issue, but the legal position taken and urged was that both power of attorney and deed could not be made valid, and that the sustaining of said Code section and decreeing them valid was a direct violation of the Constitutional rights guaranteed to plaintiff in error by the 14th. Amendment of the Constitution of the United States and the taking of his property without due process of law.

This is a federal question beyond controversy, as is hereinafter fully demonstrated, and was frequently raised as affirmatively appears in the record by motion to strike, printed record, page 161; by demurrer, printed record, page 163; by answer, printed record, pages 164–168; by objection to the introduction of evidence, printed record, pages 1 and 2; by motion to strike testimony, printed record, pages 55 to 57; by exception taken to findings and decree, printed record, page 175; and by the certificate of the Chief Justice of the Supreme Court that this question was legally and properly presented to that Court, printed record, pages 187–188.

The Code section was, of necessity, upheld and sustained by the decree of the Court affirming the whole of the decree of the Court below.

This was an action brought by the Bellingham Bay Land Company to establish the existence and validity of the power of attorney made by Betsey Jones to her husband, Thomas Jones, and to quiet the title deraigned through this power of attorney and the deed executed under it, were the main, if not the only issues, as pre-

sented by the amended complaint. Printed record, page 158.

The power of attorney was made prior to March 28th, 1862. At that date the land in controversy was in the limits of the Territory of Washington. The common law rules relating to married women was then in force, both as applied to her personal rights and disabilities and as applied to property rights. No statutory modification of the common law had been enacted, except as follows:—Laws of 1854, page 402.

"A married woman shall not be bound by any deed affecting her own real estate or releasing dower, unless she shall be joined in the conveyance by her husband and shall, upon an examination by the officer taking the acknowledgment, separate and apart from her husband, acknowledge that she did voluntarily, of her own free will and without the fear of or coercion from her husband, execute the deed, and the officer shall make known to her the contents of the deed and shall certify that he has made known to her its contents and examined her separate and apart from her husband, as is above provided."

Passed by Territorial Legislature, April 28th 1854.

A married woman was incapable of making a power of attorney to her husband. An attempt to do so was a nullity, absolutely void, and a legal impossibility for want of power :—

1st—Because at Common law and in the Territory of Washington in 1862, a married woman had no legal identity separate from her husband. She and her husband were one person, and any contract attempted to be made between them would be absolutely void for the

want of parties, they having absolutely no power to contract, the one with the other.

Vol. XIV Am. and Eng. Enc. of Law, page 591.

"At common law the wife was under the power and authority of her husband, her legal identity was merged in his, and she had of herself no separate legal existence in the eye of the law. Therefore, all of her contracts were absolutely void."

Vol. IX Am. and Eng. Enc. of Law, page 791.

"By the common law contracts between husband and wife are absolutely void for want of parties and the wife's power to consent."

Stewart on Husband and Wife (Pony ed.), Secs. 6, 38, 39, 40 and 56

Wallingsford v. Allen, 10 Pet., 594.

Preston v. Fryer, 38 Md., 221.

Roby v. Phelen, 118 Mass., 542.

2nd—At common law a married woman could not convey her real estate, the only method being, where it was desired to transfer real estate from a married woman to another person, to take proceedings which were known as proceedings by fine and common recovery.

In this country statutes have been passed allowing a married woman the right to transfer her property, provided the instruments conveying the same were acknowledged by her separate and apart from her husband. Without these statutes she could not convey except as at common law, and this personal privilege of a separate examination, certified to in the acknowledgement, is such a privilege that it cannot be delegated to any

other person, hence any attempt to convey her interest in said property by power of attorney is absolutely void and a nullity.

Session Laws, 1854, page 402, sec. 3.

Halladay v. Daily, 19 Wallace, 606.

14 Am. and Eng. Enc. of Law, pages 634 and 635.

Warvelle on Vendors, Vol. II, page 595.

First Bishop on Married Women, sec. 602.

Kelly on Contracts of Married Women, 104.

Holland v. Moore, 39 Ark., 125.

Mott v. Smith, 16 Cal., 534, 566 and 557.

Gillespie v. Woffard, 2 Caldw. (Tenn.), 632.

Denzell v. Waldie, 30 Cal., 139.

Dow v. Gould, 31 Cal., 654.

Mexia v. Oliver, 148 U.S., 664.

I.

The Supreme Court, of necessity, therefore, passed upon and upheld Code Section 1447 of Vol. I of Hill's Code, which section in express terms attempts to make valid such powers of attorneys retrospectively.

No possible ground exists on which this portion of the decree could be based, except the sustaining of the Code section named, unless the Court had held the power of attorney and deed valid at the date of their execution, which, as we have shown, they in fact did

not do, and could not do without violating well settled legal principles.

This Court will not presume a decision of the lower Court contrary to settled law where it does not affirmatively appear on what the decision was based, much less will it presume a decision to rest on grounds theretofore decided untenable by the lower Court itself, and in the face of the Certificate of the Chief Justice of the Court itself, to avoid holding that a Federal question exists.

This Court has laid down the rules governing such cases in *Klinger v. State of Missouri, 13 Wall., 263*, where the Court say:

"The rules which govern the action of this Court in cases of this sort are well settled. Where it appears by the record that the judgment of the State Court might have been based either upon a law which would raise a question of repugnancy, to the Constitution, laws or treaties of the United States, or upon some other independent ground; and it appears that the Court did, in fact, base its judgment on such independent ground, and not on the law raising the Federal question, this Court will not take jurisdiction of the case, even though it might think the position of the State Court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this Court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the State Court based its judgment on the law raising the Federal question, and this Court will then take jurisdiction."

The Supreme Court of this State, on May 11th, 1892, and prior to the decision in the case at bar, sustained

the unity of husband and wife, even under the present existing statutes to the extent of holding that they cannot enter together in a contract of partnership. Referring to the marital relation, the Court says:—

"Prior to the Act of 1881, but for the Acts commencing in 1869, the Common Law would have regulated the property rights of husband and wife. It did then, and still does regulate them excepting so far as the statute has directed otherwise."

Board of Trade vs. Hayden, 30 Pac. 87.

That in the case at bar the Court held the power of attorney from Betsey Jones to her husband, Thomas Jones, and the deed executed thereunder to Edward Eldridge on March 28th, 1862 absolutely void and a nullity at the time of their execution, is set at rest by the certificate of the Chief Justice Printed record, page 187, where he says, referring to questions raised:—

"Whether a power of attorney alleged to exist and to have been made by Betsey Jones to her husband, Thomas Jones, on the 28th day of March, A.D. 1862, which said power of attorney and deed on the respective dates of the execution thereof, were absolutely void, were made valid, &c."

The decree of the Superior Court of Whatcom County was affirmed in its entire scope by the Supreme Court of the State of Washington. Judgment of Supreme Court, printed record, page 186; Certificate of Chief Justice, printed record, pages 187 and 188; the decree of the lower Court in express terms establishes and decrees valid the power of attorney from Betsey Jones to her husband, Thomas Jones, Findings and Decree, printed record, pages 171–175.

Irrespective of the question of adverse possession,

hereinafter discussed, the plaintiff in error is entitled to a reversal by reason of the establishing and decreeing valid the power of attorney. The question of adverse possession can in no sense be made to relate to it. The portion of the decree making valid the power of attorney depends solely upon Code Section 1447. If that Code Section falls, the decree must go with it.

II.

The primary right of the Bellingham Bay Land Company claimed by them in this action is, their alleged title or interest in the disputed premises. To maintain the action they must establish some right. Section 529, Vol. II., Hill's Code of Washington:

"Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the Superior Court of the proper County to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title; and in all actions under this section, to quiet or remove a cloud from the title to real property, if the defendant be absent or a non-resident of this State, or cannot, after due diligence, be found within the State, or conceals himself to avoid the service of summons, service may be made upon such person by publication of summons as provided by law; and the Court may appoint a trustee for such absent or non-resident defendant, to make or cancel any deed or conveyance of whatsoever nature, or do any other act to carry into effect the judgment or the decree of the Court."

The pleadings set up what constitutes this right. Our contention is, that the paper title depending upon the validity of the power of attorney, and the deed executed under it, is the only primary right shown and the only issue tendered by the amended complaint. That there is no other right claimed by the defendant in error, either by direct statement or by reasonable intendment.

The amended complaint is, in form, one cause of action. It sets up a complete paper title in defendant in error through the power of attorney and deed under it. It does not, by direct statement, set up any other title or primary right. Printed record, page 158.

From its terms can it by intendment be construed to include any other title, any other primary right?

The only language used that by any possibility could be so construed is:

"That plaintiff, the Bellingham Bay Land Company, has succeeded, by a chain of mesne conveyances, to the title of the said Thomas Jones and his wife Betsey Jones, in and to all the lands heretofore decribed, excepting as follows * * . That the plaintiff is the equitable owner of all of said Donation Land Claim of Thomas Jones and his wife, Betsey Jones, excepting that part which is hereinbefore excepted, and is now in possession thereof. That the plaintiff and its grantors have been in the actual, open and notorious possession of the said property continuously since the 28th day of March, 1862, under color and claim of title. The plaintiff alleges that neither the defendant nor his grantors, ancestors or predecessors have been seized and possessed of the premises in question, or any part thereof, within more than ten years before the date of the commencement of this suit."

Under the strict rules of Common law pleading, where all things possible are taken against the pleader, it would be absurd to contend that defendant in error by the foregoing statements relied on any right other than its paper title. Under the reformed, or Code system, construed as said by Pomeroy in his work on Remedies and Remedial Rights, Sec. 546:

"With a natural spirit of fairness and equity in ascertaining the meaning of any particular averment, or group of averments, from their relation and connection with the entire pleading and from its general purpose and object."

It would be still beyond the bounds of reason to contend that the pleader had set up a title separate and distinct from his paper title.

A title by adverse possession can be acquired, but it would not be subservient to the paper title set up. Here the possession claimed is by direct averment under and in accordance with the paper title. In no sense a separate or distinct claim by reason of the possession.

The issues are framed by the pleadings, and our contention is, that no issue is raised concerning a right acquired by defendant in error by adverse possession by the pleadings. In fact at no place in the entire record does any such question appear.

In the case of *Rector v. Ashly, 6 Wall, 142*, this Court distinctly held that an averment practically identical with the one in the case at bar did not raise an issue of adverse possession. The Court there says:—

"It is claimed that the statute of limitation of the State of Arkansas it made by the Supreme Court a

distinct ground for dismissing the cross-bill of Rector. If this be found by the record to be true, it is undoubtedly sufficient in itself to sustain the decree, and is beyond the revisory power of this Court. But a careful examination of the pleadings in the case has not enabled us to discover that any of the parties, in whose favor the decree was rendered, have distinctly set up the bar of that statute, as a defense to the relief claimed by Rector. It is true that there is a casual reference in the original bill of Ashley's executrix and Beebe, to their actual and constructive possession, but it seems used rather argumentatively in favor of their title than as setting forth a distinct ground of relief; and in their answer, and in all the other answers, to Rector's cross-bill—the bill which sets up the main title in controversy—nothing is said of the possession of defendants.

"We cannot see, then, either from the pleadings or from any decree in the case, that this question was raised or considered by the Court.

"But the opinion of the Supreme Court of Arkansas is produced, and in that it is stated that the defendants are protected by the statute, and this is given as one of the reasons for the decree rendered.

"We have of late been frequently urged, in this class of cases, to look into the opinions delivered in the State Courts to ascertain on what grounds the judgments were based; and the point has been one of some controversy. It is not, however, an open question. More than forty years ago the same question arose in the case of *Williams v. Norris*, reported in 12 Wheaton. The proposition was pressed upon the Court for the same reason that it is in this case, namely: that by the statute of the State the opinions of the Court are required to be filed in writing among the papers of the case. Marshall, C. J., speaking of the Court, held that notwithstanding this act, the opinion of the State Court constituted no part of the record, and could not be looked to as the foundation on which this Court would take or refuse jurisdiction."

The first appearance of the question of adverse possession in the case at bar is in the opinion of the Su-

preme Court of the State of Washington. It is not in the pleadings or decree of the Court below. If not in the issues, any evidence concerning it is not in the case.

Our contention is, that while it is true that this Court will seek the opinion of the State Court for light to determine questions decided, still it will seek the opinion solely to determine what is shown by the record. If the record fails to show that a given question is in the case, this Court will not consider it, even if it does appear in the opinion.

This Court, in short, is the Court of last resort on the issues as presented by the record. Its judgment is final and it will not go outside of what it is called upon to decide by the issues solely because the lower Court writes an opinion wholly foreign to its decree and absolutely irrelevant to the case.

Were this Court to do otherwise, the State Courts would have the power to rob this Court of its entire jurisdiction over them. A clear Federal question, as in this case, might be the sole issue raised, and the State Court by deciding on a ground wholly foreign, would oust this Court of its jurisdiction. Such is not the intent of the twenty-fifth section of the judiciary act as amended in 1867.

In interpreting these acts this Court, speaking by Mr. Justice Miller in *Murdock v. City of Memphis*, 20 Wall., 632, says:

"It was no doubt the purpose of Congress to secure to every litigant whose rights depended on any question of Federal law that that question should be decided

for him by the highest Federal tribunal, if he desired it, when the decisions of the State Court were against him on that question. That rights of this character guaranteed to him by the Constitution and laws of the Union should not be left to the exclusive and final Court of the State Courts."

In the case at bar the pleadings and decree show but one issue, and but one series of conclusions, viz: that a power of attorney be established and be decreed valid, and that defendant in error be decreed to hold a fee title by conveyance under this power of attorney. The decree makes these questions *res adjudicata.* The closest inspection will show nothing further attempted. Plaintiff in error is entitled to have this Court pass on the questions thus rendered *res adjudicata*, if they be of a Federal character.

Rector v. Ashley, 6 Wall., 142.

Murdock v. City of Memphis, 20 Wall., 590.

Otis v. Oregon Steamship Co., 116 U.S., 548.

Chapman v. Goodnow, 123 U.S., 540.

With the issues limited to the paper title set up by defendant in error, the validity of section 1447 of Vol. I. of Hill's Code is raised by each of the first six assignments of error, and the case at bar depends solely upon its determination.

III.

Should we assume that an issue is raised in this case sufficiently broad to allow defendant in error to rest its

claim on a title acquired by adverse possession, still our insistment is that the Supreme Court of the State of Washington did not and could not decide and affirm the decree of the lower Court without directly passing upon the validity of said Code Section No. 1447.

Aside from the written opinion, as we have seen, there is no element of adverse possession in the pleadings or decree.

The opinion, after stating the issues in which it expressly rests the title of defendant in error on its paper title, in express words sustains the validity of Code Section 1447. The laguage is:—

"The proof of two facts was attempted by the Respondent, the establishment of either of which would be fatal to Appellant's claim. The facts attempted to be proven were as follows: (1.) That plaintiff's title to the land in controversy had been acquired by adverse possession. (2.) That Betsey Jones had executed a power of attorney to her husband, Thomas Jones, authorizing him to sell the disputed premises."

The entire balance of the opinion is a discussion of the necessary elements constituting the fact of adverse possession. The quotation from the opinion is the deciding on the legal proposition raised, and was necessary to the decree which in terms declares valid the power of attorney.

In the discussion on adverse possession the Court also directly passed upon and sustains Code Section No. 1447 in its written opinion, and on the doctrines laid down no decree on adverse possession alone could be rendered without sustaining the Code Section.

In the opinion, printed record page 181-186, the Court says:—

"It must be conceded at the outset that the hostile possession must be continuous and notorious, and that it cannot be made out by inference, as the presumption is in favor of the true owner, it must be exclusive, for where there are two in possession, one with and the other without title, the law will ascribe the possession to him who has the right. It must be continuous, for so soon as the adverse possession ceases, the constructive seizen incident to the better title is renewed. It must, of course, be under claim or color of title or it would not ripen into title. But admitting all these propopositions in favor of Appellant, we think the Respondent's claim is established.

It is well established, and in fact not denied that Eldridge entered into possession under the highest claim of title, viz; a warranty deed from the owner, and there is no question of subordination or subserviency to a higher title in the case. The contract was an executed contract. The ouster of the legal seizen was complete, according to the undisputed testimony of Eldridge. It was not a mere trespass, for under color or claim of title Eldridge, after having received the deed and on the same day, took possession of the land."

We fully realize that this Court will in no case review the decision of the State Court on the correctness of its rulings in such a matter, as adverse possession, and will not review the facts constituting the actual, open, notorious or continuous possession, even if this Court could not sustain the views of the lower Court.

In the case at bar, however, the State Court has expressly decided that in this case a color of title is necessary to support a title by adverse possession. They have also designated the instrument which they decide is the color of title on which their decision rests, viz: a warranty deed from the owners.

The question then arises, whether this deed can be a

color of title, except by reason of sustaining Code Section 1447.

The deed is made March 28th, 1862 by Thomas Jones and Betsey Jones, his wife, to Edward Eldridge, and is signed by Thomas Jones for himself and as attorney in fact for his wife. Exhibit B, Printed Record page 109-110.

By the issue in this case the portion of the Jones Donation Claim in controversy is that owned by Betsey Jones. Plaintiff in error disclaimed as to that portion owned by Thomas Jones, Complaint Printed Record page 158, and disclaimer Printed Record page 162. This deed could not be a color of title, by reason of the signature of Thomas Jones in his individual capacity, by reason of the fact that the land sought to be conveyed was the property of his wife, and a deed from him would have been consistent with his rights as her husband.

It is an admitted fact that Thomas Jones and Betsey Jones were husband and wife, and remained so until the death of Betsey, in December, 1868. Printed Record page 1. On such a statement of facts the law is settled. The husband was entitled to the real estate of the wife during coverture, by reason of the marriage relation. He had the right to occupy the premises, even against the will of the wife, the right to dispose of the possession during coverture; in fact, by operation of law, he was a tenant during coverture and for life, if issue was born alive.

"At common law a husband holds during coverture in right of his wife, she being merged in him, all her

lands in possession and owns the rents and profits thereof absolutely."

Stewart on Husband and Wife, Section 146: also cases cited note 6.

"At common law the rights of the wife to her property become for the time being merged by the coverture; and if this property consists of lands the husband alone is entitled to the rents and profits thereof."

1 Wash. Real Estate (last ed.) pages 180, 329 and 458.

"The husband's right is so entirely his own that if he is disseized during coverture neither his wife nor her heirs would be affected by a possession under such a disseizen, however long continued, so long as the husband was alive."

Foster v. Marshall, 2 Foster (N.H.), 491.

In *Burleigh v. Coffin*, 22 N. H. 118; S.C. 53 Am. Dec., 236, Eastman J., says:

"If, at the time of the marriage, she is seized in fee of lands, the husband, upon the marriage, becomes seized of the freehold *jure uxora*, and he takes the rents and profits during their joint lives. It is a freehold estate in the husband, since it must continue during their joint lives, at least, and may last during his life should he become tenant by the courtesy."

See also *Edrington v. Harper*, 3 J. J. Marshall, 353; S. C. 20 Am. Dec. 145.

The possession of the husband could, therefore, in no sense, be hostile to the title of the wife. It is subservient and subordinate to her title by reason of the marriage relation. One claiming under the husband can have no higher or greater right than the husband. The stream cannot rise above the source.

The possession taken by one claiming under the hus-

band was the possession of the husband, no more. A possession and right thereto during coverture and during the life of the husband, if issue were born alive.

The possession of the husband and of Eldridge claiming under him was consistent with a peaceable holding under the law, as it were, a tenancy, not notice of an adverse claim sufficient to set the statute in motion, even were the premises occupied actually with brick buildings. The husband's possession, or those holding under him during coverture, is consistent with and subject to the title of the wife.

It affords no notice of an adverse claim to the wife. The fundamental principle, that of notice, is wanting, and without it, or acts equivalent thereto, no adverse claim can stand. Not a single case holding a contrary doctrine can be found to exist.

In *Jones v. Freed*, 42 Ark., 357, a case where husband's deeds to wife's land is held good, as conveying his right to take rents and profits during coverture, and as tenant by the courtesy, Justice Smith says:

"But in truth, Dacus, the tenant for life (husband) having conveyed the estate in fee, the statute does not run against the reversioner until the particular estate has been determined. The present suit is premature. The plaintiff will not be entitled to the possession of the premises during the joint lives of Dacus and his wife, nor until the death of Dacus, if he has courtesy."

In a case where the land of a wife is sold by her husband the possession is not adverse while the marriage exists.

Stephens v. McCormick, 5 Bush. (Ky.), 181.

In *Culler v. Motzer*, 13 S. and R., 356, S.C., 15 Am. Dec., 604, Duncan, J., says;

"But the law is different where the tenant holds by conveyance from the husband, for the rule of possession is that where a person comes to the possession of land by his own agreement, and holds that possession, he and all those claiming under him must hold it according to the right of that possession and cannot qualify it by any other right."

In *Jackson v. Shoonmaker*, 4 John, N.Y., 402, Chancellor Kent says:

"Neither a descent cast nor the statute of limitations will effect a right if a particular estate existed at the time of the disseizen, or when the adverse possession began, because a right of entry in the remainderman cannot exist during the existence of the particular estate."

First Nat. Bank v. Guerra, 61 Cal., 169.

Maudlin v. Cox, 7 Pac. Rep. (Cal.), 804.

Bell v. Bell, 37 Ala., 536.

Veal v. Robinson, 70 Ga., 809.

Hendricks v. Rasson, 53 Mich., 575.

Salmon v. Davis, 29 Mo., 176.

Miller v. Ewing, 6 Cush. 34.

Molloy v. Brudden, 86 N.C., 251.

By sustaining Code Section 1447, as hereinafter discussed, it would have been a good color of title, considered as a deed of Betsey Jones by her husband, Thomas Jones, attorney in fact.

To avoid passing on the Code Section this Court will not presume that the Court below decided on an untenable ground.

The exact ground on which the Court passed is, however, set at rest by the certificate of the Chief Justice, in which he says:—

"And such opinion as is expressed by the statement of this Court in its written opinion in the above entitled action that the color of title necessary to support a claim by adverse possession in Respondent, the Bellingham Bay Land Company, rests and depends solely upon a warranty deed from the owner, Betsey Jones, executed by her husband, Thomas Jones, by virtue of the power of attorney urged and alleged by respondent to have been made valid by the retrospective part of the said Code Section, which said statement, as set forth in the opinion of this Court, is an integral and necessary part of the decision by this Court rendered in affirming the said decree of the lower Court."

The deed from Betsey Jones by Thomas Jones, her husband, as attorney in fact, under date of March 28th, 1862, is the color of title found necessary by the State Court to sustain a title by adverse possession.

Prior to the passage of Code Section 1447 such an instrument was not a color of title. By virtue of that Section it is a color of title.

This Court, in *Wright v. Mattison*, 18 How., 56, defines a color of title to be :

"That which in appearance is title, but which in reality is no title," and in the same opinion the Court say:

"What is color of title is matter of law, and when the facts exhibiting the title are shown the Court will determine whether they amount to color of title."

Again, defining what is color of title, this Court, in *Hall v. Law*, 102 U. S. 466, says:

"Whenever an instrument by apt words of transfer from grantor to grantee, whether such grantor act under the authority of judicial proceedings or otherwise, in form passes what purports to be the title, it gives color of title."

Prior to the passage of Code Section 1447 the paper claimed by the defendant in error to be a deed sufficient to form a color of title was not such an instrument that on its face purported to convey, it did not purport to have a grantor.

It, on its face, affirmatively set out that Betsey Jones was the wife of Thomas Jones, and that it was executed by Thomas Jones, as her attorney in fact.

It, therefore, was an assertion that no grantor competent to convey anything was attempting to act. It, on its face, was an absolute nullity, as much so as if it had asserted that it was made by Betsey Jones, now deceased, by Thomas Jones, her attorney in fact. The assertion that Betsey was the wife of Thomas Jones was the assertion of a legal incapacity of Betsey to be a grantor by her husband, as attorney in fact

The impossibility of a wife contracting at that date with her husband by making him her attorney in fact, was an inflexible rule of the law, as heretofore fully discussed.

This Court, in passing upon the effect of such a contract, in *Hall v. U. S.*, 92, U. S. 30, says:

"In the light of these authorities it is clear that if Hall did contract with Roach, as he alleges he did, the contract was an utter nullity. In the view of the law it created no obligation and conferred no rights as to either of the parties, it was as if it were not."

Again in *Gibbs v. Baltimore Gas Co.*, 130 U. S., 410, this Court says:

"The law cannot recognize as valid any undertaking to do what fundamental doctrine or legal rule directly forbids. Nor can it give effect to any agreement the making whereof was an act violating law. So that, in short, all stipulations to overturn—or in evasion—of what the law has established; all promises interfering with the workings of the machinery of the government in any of its departments, or obstructing its officers in their official acts, or corrupting them; all detrimental to the public order and public good, in such a manner and decree as the decisions of the Courts have defined; all made to promote what a statute has declared to be wrong,—are void."

Consider the instrument as a nullity, and as showing on its face that there was no competent grantor, and it is not a color of title.

In *Smythe v. Henry*, 41 Fed., 708, the Court says:

"It is further insisted that the deed to Sherrell was at least color of title, and gave him a right to the land by reason of his first possession and the continuous possession of his tenant, Junaluska, for seven years. I am of the opinion that a deed made in violation of the provisions of an express statute is void for all purposes, and will not constitute a color of title so long as it contravenes such expression of legislative will. There are numerous decisions in the Courts which declare that a void and worthless deed will constitute color of title that will have operation under statutes of limitation, but such deeds were void for other causes than those which contravene an express prohibition of a statute, or some well established policy of the law."

In *Moore v. Brown*, 11 How., 425, this Court says:

"Being a void deed, possession taken under it cannot be said to be adverse and under color of title. What was the fact in this case? It is disclosed upon the face of the deed, that the Auditor sold the land

short of the time prescribed by the act. It was not, then, a sale according to law. That must have been as well known by the purchaser as it was by the Auditor. The law presumes it to have been. The act under which the sale was made was not meant to prescribe the authority of the Auditor only to make sales, but also to give to purchasers full information of the terms upon which a title could be acquired to lands sold for the non-payment of taxes. It was meant to put bidders at a tax sale upon the inquiry, whether or not the land was offered for sale according to law. If they do not examine, and shall buy land exposed for sale for taxes, against the law, they do so at their own risk, and it will be presumed against them that they know that the deeds given under such circumstances are made in violation of official duty and of the law. It cannot be made the foundation of an adverse possession under color of title against the true owner of the land, whose title to it, the law says, can only be divested in a certain way for a failure to pay taxes due upon the land. We do not put the conclusion upon the point exclusively upon the fact that it is a void deed; but it is so, being a deed made in violation of law."

In *Redfield v. Parks*, 132 U.S., 225, this Court says:

"In *Waterson v. Devoe*, 18 Kansas, 223, 232, the Court held that the tax deed, upon which its face showed it was void, did not support the possession as a bar under the short statute of limitations in that State which applied to actions for the recovery of lands sold for taxes. The Court, in that case, said, quoting from the previous case of *Shoat v. Walker*, 6 Kansas, 65:

"'A tax deed to be sufficient, when recorded, to set the statute of limitation in operation, must of itself be *prima facie* evidence of title. * * It is not necessary that it be sufficient to withstand all evidence brought against it to show that it is bad; but it must appear to be good upon its face. * * When the deed discloses upon its face that it is illegal, when it discloses upon its face that it is executed in violation of law, the law

will not assist it. No statute of limitations can then be brought in to aid its validity.'

"Similar decisions have been made in the cases of *Mason v. Crowder*, 85 Missouri, 526; *Sheeky v. Hinds*, 27 Minnesota, 259; *Cutler v. Hurlbut*, 29 Wisconsin, 152; *Gomer v. Chaffee*, 6 Coloreda, 314; *Woffard v. McKinna*, 23 Texas, 36.

"We do not discover in the Statute of Arkansas, nor in the decisions of its Courts, cited by counsel for defendant, anything to contravene these views, and we think that both the weight of authority and sound principle are in favor of the proposition that when a deed founded on a sale for taxes is introduced in support of the bar of a possession under these statutes of limitations, it is of no avail if it can be seen upon its face and by its own terms that it is absolutely void."

In the State of Washington, in addition to the fact that there is nothing to contravene these doctrines, we find their actual endorsement in the case of *Hurd v. Brisner*, 3 Wash., 1, where the Court say:

"It the sale was void, which we think it was, none of the claims made by the appellant under the statute of limitations are good."

After the passage of the Code Section, which in express terms makes valid this deed and retrospectively gave to Betsey Jones the authority to execute a power of attorney to her husband, the impossibility of Betsey Jones as grantor was removed and the deed at once became a valid color of title, as it then might have passed title, and as the Court in its opinion say, renders the discussion of the existence of a power of attorney as a fact unnecessary.

In the case at bar the Certificate of the Chief Justice expressly states that the Court viewed the instrument as void and a nullity at the date of its execution; and

that the question of its being made valid was duly raised and decided so far as was necessary to sustain its decree, and to make it a valid color of title. The conclusion that they passed upon the validity of the Code Section is inevitable.

The mere statement of the decree in this case in declaring valid the power of attorney and decreeing that defendant in error has absolute title to the disputed premises and that the plaintiff in error has no title thereto, demonstrates that the judgment was made against the plaintiff in error.

We have attempted to show that this decree could not have been made without of necessity passing upon and sustaining the validity of Code Section 1447, and that the Court, in fact, did sustain said Code Section. If the decree could not have been rendered without deciding it, it is immaterial whether in fact the Court did pass upon the question.

Arrowsmith v. Harmony, 118 U.S., 194.

Is the question thus raised of a Federal nature? Sec. 709 of the Revised Statutes of the United States, in stating what is generally termed Federal questions, among others, give the following:

"Where is drawn in question the validity of a statute of or an authority exercised under any State on the ground of their being repugnent to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity."

In this case it is contended that the validity of Code Section 1447 is drawn in question as being repugnent to the 14th Amendment of the Constitution, in that it

deprives the plaintiff in error of his property without due process of law, and that the decision was in favor of its validity.

By the foregoing discussion it is manifest that the validity of the Code Section was drawn in question and was sustained.

Is it repugnent to the 14th Amendment ?

It was incumbent on the defendant in error to sustain the decree of the Court below to establish a subsisting interest in the premises in controversy. This was done by the sustaining of the Code Section. It was, therefore, the Code Section that gave a subsisting interest in the disputed premises to defendant in error. The amended complaint, printed record, page 158, sets up the claims of plaintiff in error to the disputed premises as follows:

"The claim of the defendant is based upon the following facts, to-wit:—

"First, that he alleges that the said power of attorney was void and was not and is not sufficient for the purpose of conferring any authority upon the said Thomas Jones to make the said conveyance hereinbefore referred to; and, secondly, that the said power of attorney was never placed upon record; thirdly, the plaintiff alleges that long before the year 1888 the said Betsey Jones, wife of the said Thomas Jones, died intestate; that she left surviving her as heirs at law a sister, Mrs. Mary Lovatt, Rosanna Carter, William Hill, and Mary Wilkes, children of Ann Hill, deceased, which said Ann Hill was also a sister af the said Betsey Jones; that on the 8th day of May, 1891, the said defendant procured from Rosanna Carter and James Carter, her husband, William Hill, Mary Wilkes and Joseph Wilkes, her husband, a deed for the said lands, which said deed was filed for record by the the defendant in the office of the Auditor of Whatcom County,

on the 4th day of June 1891, and was by the said Auditor duly recorded in book of deeds, No. 25, on pages 33 and 34 thereof; that on the 7th day of May, 1891, the said defendant procured from the said Mary Lovatt and William Lovatt, her husband, a deed purporting to convey the premises hereinbefore described, which said deed was filed by the defendant with the Auditor of Whatcom County for record on the 4th day of June, 1891, and was duly recorded in book of records No. 25, on pages 31 and 32 thereof on said day. That under and by virtue of the said deeds the said defendant claims to be the owner of the said premises."

The plaintiff in error in his answer to this amended complaint, admits his claim in the following language:

"Answering to the eighth paragraph of the said amended complaint, this defendant admits that his claim is based upon the following facts, and admits and expressly charges the following to be the facts and to be true:

"He admits that he claimed that the power of attorney heretofore referred to was void, and was not and is not sufficient for the purpose of conferring any authority upon the said Thomas Jones to make the said conveyance heretofore referred to, even if in fact any such power of attorney ever did exist.

"And he admits that said power of attorney and no power of attorney was ever placed upon the records of Whatcom County, and charges the fact to be that no power of attorney from the said Betsey Jones to the said Thomas Jones ever has been placed of record upon the records of Whatcom County; and admits and charges the fact to be that this defendant has at no time had any knowledge or notice, either actual or constructive, of any power of attorney from said Betsey Jones to said Thomas Jones, or to any other person whatever; and admits that he claimed that long prior to the year 1888, and charges and alleges the fact to be that long prior to said date, the said Betsey Jones, wife of the said Thomas Jones, died intestate; and admits that he claimed, and charges the fact to be that said

Betsey Jones left surviving as her sole heirs at law, a sister, Mrs. Mary Lovatt, and Rosanna Carter, William Hill, and Mary Wilkes, children of Ann Hill, deceased, which said Ann Hill was also a sister of the said Betsey Jones; and this defendant admits that he claimed and charges that the fact is that on the eighth day of May, 1891, this defendant procured from Rosanna Carter and James Carter, her husband, William Hill, Mary Wilkes and Joseph Wilkes, her husband, a deed for the east one half of the land above described, it being the east one half of the Jones Donation Claim, which said deed plaintiff admits he claimed to have been, and charges the fact to be that said deed was filed for record by this defendant in the office of the Auditor of Whatcom County on the 4th day of June, 1891, and was by the said Auditor duly recorded in book twenty-five of deeds, pages 33 and 34; and this defendant admits that he claimed and alleges the fact to be that on the seventh day of May, 1891, this defendant procured from the said Mary Lovatt and William Lovatt, her husband, a deed conveying the east one half of the premises above described, known as the east one half of the Jones Donation Claim, which said deed defendant admits he claimed, and charges and alleges was, as a fact, filed by this defendant with the Auditor of Whatcom County, on the 4th day of June, 1891, and was duly recorded in book of records twenty-five, on pages twenty-one and twenty-two, on said day; and this defendant admits that he claimed, and alleges and charges as a fact that by virtue of said deeds this defendant is the owner in fee simple of the east one-half of the said premises above described, to-wit: The east one half of the said Jones Donation Claim."

By the testimony, printed record, page 106, it appears that plaintiff in error is in possession of the premises in controversy.

The sustaining of the Code Secton is, therefore, the giving of a subsisting interest in land to defendant in error and thereby enabling the defendant in error to deprive plaintiff in error of his possession of the land

and his right to possession and estate and title in fee derived from Betsey Jones; and a giving and decreeing this title to be in defendant in error. It is a depriving of plaintiff in error of property without due process of law. The amended complaint is an assertion of the claim of plaintiff in error through Betsey Jones as a cloud on a title that defendant in error would not have except by reason of the Code Section.

Plaintiff in error owns the land by reason of deeds from the heirs of Betsey Jones, printed record, pages 145-147. The original right of property in Betsey Jones was acquired by contractural relations, to-wit:— a patent from the U. S., printed record, page 107. It was a property right absolute and inherent and not dependent on any statutory right. The power of attorney and deed thereunder were absolute nullities. Her property and right in the land were the same after and before their execution. They made no change. She died before the passage of the Code Section in 1888, printed record, page 1.
seized of a fee simple estate. Her heirs at once became vested of a property right, the fee simple of the land. They, by deed,, conveyed it to the plaintiff in error. The decree of the State Court, by sustaining the Code Section, arbitrarily adjudges this property to belong to defendant in error, and deprives plaintiff in error of it. The basis of the decree, viz.: the Code Section, takes the property of one, and by legislative act gives it to another without any process and without an opportunity to defend or to be heard.

The Court, by its decree, declares the title to be in

defendant in error, and that plaintiff in error has no title. They base this decree, as shown by the opinion, printed record, pages 181–186, not on any weakness in the title of plaintiff in error, but on the strength of the title of defendant in error, which, as we have shown, rests solely on the Code Section, for that reason alone they decree that plaintiff in error has no title, and, were it not for the sustaining of the Code Section, he would have the fee simple title.. Not only in effect, but directly taking his property without due process of law.

This Court in *Kankauna v. Green Bay &c. Canal Co.*, 142 U. S., 269, speaking by Mr. Justice Brown, says:

"Notwithstanding the inhibition of the Constitution is not distinctly put in issue by the pleadings, nor directly passed upon in the opinion of the Court, it is evident that the Court could not have reached a conclusion adverse to the defendant Company without holding either that none of its property had been taken, or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law. This Court has had frequent occasion to hold that it is not always necessary that the Federal question should appear affirmatively on the record, or in the opinion of an adjudication if such question were necessarily involved in the disposition of the case by the State Court.

Wilson v. Blackbird, Creek Marsh Co., 2 Pet., 245.

Armstrong v. Athens Co., 16 Pet., 281.

Chicago Life Ins. Co., v. Needles, 113 U.S., 574.

Eureka Lake Co. v. Yuba County, 116 U. S., 410.

Scott vs. McNeal, U.S. Supt. Ct., May 14, '94.

The validity of Section 1447, Vol. I. Hill's Code,

was sustained by the State Court and the decree cannot stand without it. Did the Court err in holding it a valid statute and not in conflict with the 14th Amendment of the Constitution of the United States?

Betsey Jones acquired the property in controversy by contractual relation from the United States. It was an inherent right, a natural right of property, dependent on no legislative act. The power of attorney and the deed given under it mere nullities, mere waste paper, of no more effect than had they never had an existence in fact. No equitable interest passed, no right legal or equitable could be enforced by the grantee to such instruments. Betsey Jones died intestate prior to the date of the passage of the Code Section. Her heirs at law at once became seized of the property in fee simple. Their title became complete. Their right of property was a natural right and absolute.

The Code Section was passed and became a law. If valid, by arbitrary legislative act it takes the property from the heirs and gives it to the grantors of defendant in error.

The whole spirit of our form of government rebels at such a monstrous wrong. The 14th Amendment in express terms forbids it.

The guise under which the statute comes is as a curative statute, one passed to remedy a defective transaction, to heal imperfections, not to create. Not to make a power of attorney or a deed where none existed or could by any possibility exist. The sole purpose of such statutes is to validate an act which, in its inception, was voidable, as being in the interest of

equity and good conscience, the party having had a right to do the act made valid and have attempted to do so but by some oversight having failed in the attempt, the curative act is simply the carrying into effect the intention of the parties.

If there is nothing to cure, nothing to make valid, that is, if the original transaction were void and a mere nullity, no subsequent legislation can infuse life into it, for it was absolutely dead.

Orton v. Noonan, 23 Wis. 102, the Court says:—

"The Act of 1866, Chap. 53, laws of 1866 has no influence upon the question for the very plain reason that the legislature has under the Constitution no power to declare a deed valid which by law was void, as between the parties to it at the time of the passage of the Act."

In *Kimball v. Rosendale*, 42 Wis., 407, the Court says:

"The true limit of the curative power of the legislature as gathered from all the authorities and sanctioned by principle, is, or ought to be, that it can reach things voidable only, not void; defects of execution only, not of authority or jurisdiction, and is confined to defective proceedings under previous legislative authority."

Alabama ins. Co. v. Boykin, 38 Ala. 510.

Pryor v. Downie, 50 Cal. 388.

Harper v. Rowe, 53 Cal. 233.

Sharp v. Blankenship, 59 Cal. 288.

Russel v. Ramsey, 35 Ill. 362.

Wentworth v. Clark, 38 Ark. 405.

McGhee v. McKenzie, 43 Ark. 156.

Grove v. Todd, 41 Md. 633.

Ratsong v. Wolfe, 35 Mo. 174.

Baggs Appeal, 43 Penn. St 512.

Tilton v. Swift, 40 Iowa, 78.

Austin v. Cummins, 16 Ga. 102.

Commissioners v. Bunker, 16 Kans. 498.

Chestnut v. Shanes Lessees, 16 O., 599.

Loomis v. Brush, 36 Mich. 40.

Town of Goshen v. Stonington, 4 Conn. 209.

Maguiar v. Henry, 84 Ky. 1.

7 Lawson's Rights Remedies and Practice, page 6071.

1 Am. and Eng. Enc. of Law, 162 and note 1.

3 Am. and Eng. Enc. of Law, 758 and notes.

Especially is it true that no valid curative act can be passed when vested rights of other than the original parties have intervened between the date of the transaction attempted to be cured and the passage of the curing statute.

In *N.Y. & Oswego R.R, Co. v. VanHorn*, 57 N.Y. 473. the Court says:—

"It is claimed by the plaintiff that the last clause of this section has a retrospective effect so as to render valid a subscription previously made, without the payment of the ten per cent. It cannot have such effect for two reasons. Previous to the passage of this Act the subscription was wholly invalid and could not be enforced by either party. If the effect claimed be given to act it makes a binding contract between the parties where no contract previously existed, and in effect takes $200. of the defendant's property and transfers it to the plaintiff, a private corporation. This, no act of the legislature could do. It can never take the private property of one individual without his consent

and give it to another. * * Such an act comes in direct conflict with the Constitutional provision that no person shall be deprived of life, liberty or property without due process of Law."

In *Meighen v. Strong*, 6 Minn., 177, S.C. 80 Am. Dec. 441, the Court says:

"The Act of July 26, 1856, declaring all conveyances executed in the presence of one witness to be legal and valid does not, in our opinion, aid the plaintiff. The rights of the defendants had accrued before the act was passed. Where there has been an actual conveyance of lands, but the conveyance is defectively executed, the legislature may cure the defect, so far at least, as to bind the parties thereto. * * . In that case the statute would operate, not upon the conveyance itself, but upon the evidence by which it is to be established, and could not be said to effect the title, for that had already passed though the evidence of it was sufficient. But when, as in this State, the statute prescribes the manner in which only a conveyance of real property by deed can be made, any attempt to convey without complying with the requisites of the statute, must be treated as a mere nullity and the legislature could not give it validity so as to effect persons who may have subsequently acquired title to the property without divesting them of rights they had legally acquired."

In the leading case of *Maxwell v. Goetschins*, 40 N. J. law, 383, Chief Justice Beasley, speaking for the Court, says:

"I cannot differ this case in any degree from what it would be if this sale of this remainder had been made by a person who possessed no official character; the question is the same as if the father of these remainder-men had, deeming it for their interest, converted their property into money. Could the legislature have validated such a transaction? It will be observed, if this can be done, it is the act of legislation that is operative; the sale under the partition being wholly void has no effect whatever, and in this respect

this case is totally unlike that class of cases recognized in the decisions where warranted proceedings have failed from irregularities or defects of form, and where, by the legislative removal of such defects, the proceedings have become complete. In the present case the statutory act must have the creative effect of originating the title. Is such an exertion of the legistative power legitimate in this State? * * * The power of the legislature being, then, thus limited to this single field of action, how is the enactment of the present law to be vindicated? If it has the effect intended, it takes this vested estate out of these remainder-men and converts it into money. The question whether the owner's land shall without his assent be turned into money has always at the common law and in this State been deemed one addressed to judicial discretion. The right to decide in such junctures has always been confided in part to Court's of equity, Even where such sale has taken place in this State in a course of law for the partition of lands the parties interested have been entitled to notice, and the proceedings have ever been under the control of the Courts. It has been ever so. If land can be sold by persons without authority, and without a hearing or an opportunity for a hearing being given to the owner, and such sale made valid by a legislative act, I am at a loss to conceive what force is to be afforded to that clause in the constitutional bill of privileges which declare that among the inalienable privileges of men shall be that of 'possessing and protecting property.' I understand by this that the property and rights of every man are put under judicial protection so that he cannot be deprived of them except by the law of the land; and by the law of the land I understand something very different from the act of officers without jurisdiction in conjunction with a legislative confirmation. I have concluded that the statute in question has no legal basis. * * * But aside from such illustrations of the rule applicable to such junctures as these, stands the case of a legislative act intended to give life to a proceeding void, not because of an error of form, but for want of jurisdiction in the adjudging tribunal. With regard to this class,

Judge Cooley, in his valuable book on Constitutional limitations, page 107, says justly: 'But it would not be competent for the legislature to authorize a Court to proceed and adjudicate upon the rights of the parties, without giving them an opportunity to be heard before it; and for the same reason, it would be incompetent for it, by retrospective legislation, to make valid proceedings which had been had in the Courts, but which were void for want of jurisdiction over the parties.' An examination of the authorities cited for this proposition by this learned writer will satisfactorily show that this statement in the text is fully warranted by the decisions of Courts of the highest standing. In Pennsylvania *(Richards v. Rote*, 68 Pa. St., 248), a question arose in a case of the general nature of the one under adjudication. It was a proceeding for partition, and the notice required by the statute had been served on a person, who it was supposed, was the guardian of one of the parties in interest, but it turned out that such supposition was ill founded, and on that account the proceeding, so far as related to such party, was *coram non judice.* A statute was passed to legalize this extra judicial action, and the Court held such an act unconstitutional. The language used by the Court is emphatic in its repudiation of this class of laws. 'What is this' it is asked, 'but a mere bald attempt to take the property of A and give it to B?' At the date of the passage of the act, Lewis Richards had an undivided share—a fourth part of the land in question—and by the legislative fiat validating these proceedings in partition, which the law then pronounced a nullity, as far as his estate was concerned, this undivided share is divested from Lewis Richards and vested in Griffin Rote.' In a subsequent part of the opinion the distinction is drawn between a statute to supply formal omissions and remedy irregularities in the course of a procedure authorized by law, and an attempt by the same method 'to infuse life into that which is dead and to give effect to a mere nullity.' In *McDaniel v. Correll*, 19 Ill., 226, a similar endeavor was made to validate a void proceeding by legislative enactment and the effort failed, as it did likewise in the Supreme

Court of Wisconsin in the case of *Nelson v. Rountree*, 23 Wis., 268. The same subject received a careful examination by the Supreme Court of Massachusetts in *Denny v. Mattoon*, 2 Allen, 361, and the alleged right of the legislature to vitalize a judicial act that was void was utterly disallowed. This was a proceeding in insolvency, commenced by a petition of creditors before a person claiming to act as a judge of insolvency, but who had no title to such office, and the legislature had passed an act legalizing such proceeding With regard to this point, this is the language of the Court: 'To say that a man's property may be taken from him by force of an act of legislation, which attempts to confirm and give validity to proceedings which have previously been adjudged void for want of authority and jurisdiction, is only to affirm that he may be deprived of his estate without due process of law.' A similar constitutional construction is approved of in the following authorities: *Powers v. Bergen*, 6 N.Y., 358; *Jones' Heirs v. Perry*, 10 Yerger. 59; *Shonk v. Brown*, 61 Penn., 320."

This Court has frequently recognized these principles.

Calder v. Bull, 3 Dall., 386.

Gunn v. Barry, 15 Wall., 610.

Savings and Loan Assoc. v. Topeka, 87 U. S., 461.

Hall v. United States, 92 U.S., 30.

Davidson v. New Orleans, 96 U. S., 97.

Cross v. U. S. Mortgage Co., 108 U. S., 795.

Campbell v. Holt, 115 U. S., 620.

Freeland v. Williams, 131 U. S., 199.

Kankauua Co. v. Green Bay &c. Canal Co., 142 U. S., 269.

Baker v. Kilgore, 145 U. S., 487.

It is immaterial whether the rights vested in persons other than the contracting parties be rights vested by

purchase or by desent. If, as a fact, any persons other than the original parties have acquired in any way such rights they inherently possess the right of property, which right of property cannot be taken from them by legislative enactment.

Alter's Appeal, 67 Penn St., 341.

S. C. 5 Am. Rep., 433.

Norman v. Heist, 5 Watts & Serg., 171.

Shonk v. Brown, 61 Penn. St., 320.

Ballard v. Ward, 89 Penn. St., 358.

Donovan v. Pitcher, 53 Ala., 411.

S. C. 25 Am. Rep., 634.

6 Lawson's Rights, Remedies and Practice, page 5075.

Many authorities can be found sustaining curative statutes. Our contention is, that but few, if any, exist that sustain a statute that gives life to a void act, to a nullity. The overwhelming weight of authority and logic and reason as well forbid such attempted legislative control of property rights. Such an act is in itself the transfer of the property and is a taking of property without due process of law.

The cases of *Sutterlee v. Matteson*, and *Watson v. Mercer* decided by this Court, in no sense conflict with the contentions here made. They were both decided in the Supreme Court of the State of Pennsylvania and were brought to this Court under the twenty-fifth section of the judiciary act at a time prior to the passage of the 14th. Amendment. This Court, therefore, as stated in the opinions, had absolutely no power to con-

sider the wisdom of the decisions of the Court below. It could consider no question except as to whether or not the decision of the Supreme Court of the State of Pennsylvania in these cases was in conflict with any constitutional provision of the United States. This Court held that the decisions in these cases did not impair the obligation of any contract, and that there was no constitutional protection of vested rights, or rather no clause prohibiting a State to pass laws taking away such rights. Not until the adoption of the 14th Amendment was this prohibition put on State legislation. The cases heretofore cited from this Court demonstrate that since the 14th. Amendment this Court recognizes a vested right of property, and will protect the same from State legislation attempting to destroy it.

The same is true of the case of *Randall v. Kreiger.* In addition, in that case the power of attorney was executed in New York, where it was valid, and consequently the acts done under it were not void in their inception, but were voidable merely. The case also turned on the fact that inchoate dower was not a vested right, and therefore the curative act did not divest any right of property.

We, therefore, contend that the first six assignments of error cover a Federal question; this affirmatively appears from the record to have been raised before and decided by the State Courts adversely to plaintiff in error. That its decision was necessary to the decree rendered, and that the Court below erroneously decided the same.

Should this Court be of the opinion that the question of adverse possession was a sufficient ground for the State Court to base the whole of its decree, and that the Federal question heretofore discussed was not necessarily determined in a decision on adverse possession, still we contend that by the eighth assignment of error a second Federal question is raised that precludes a decision against Plaintiff in error on that ground.

It affirmatively appears by the record that the legal title to the disputed premises remained in the United States until September 6th. 1871, and that plaintiff in error claims through a donation patent. Printed record, page 107 and that this action was commenced on June 9th. 1891. See date of filing complaint, Printed record page 155. A period of less than twenty years elapsed between the passing of the title from the United States and the commencement of this action.

It also affirmatively appears by motion to strike testimony relating to adverse possession, Printed record page 56 that the question as to length of time of possession was raised.

It also affirmatively appears by the opinion of the Court and the Certificate of the Chief Justice that a color of title was necessary to sustain a title to adverse possession, and that the deed from Betsey Jones by her husband, Thomas Jones, as her attorney in fact, dated March 28th. 1862, was the color necessary to the decision rendered, and that by reason of the possession under that color nearly thirty years possession was acquired.

It therefore appears that the decision rendered was

based on a possession of necessity running prior to the date of the issuance of the patent, and against the validity of an authority exercised under it, thereby raising a federal question.

Shively v. Bowlby, 152 U. S., 1.

That such a decision is erroneous is beyond question and is *stare decisis* in this Court.

Gibson v. Chouteau, 13 Wall., 92.
Redfield v. Parks, 132 U. S., 239.

The statute of limitation in the Territory of Washington was twenty years until December 1st. 1881, when it was reduced to ten years, which latter period had not elapsed at the date of the commencement of this action.

Should this Court consider that the questions discussed are not controlling, still we contend that by the ninth assignment of error a third Federal question is raised that procludes a decision against plaintiff in error on the ground of adverse possession.

Prior to December 1st. 1881, a twenty year statute of limitation was in force. Twenty years had not expired between the date of the patent to Betsey Jones and the commencement of this action. Ten years had not expired since the passage of Section 112, Vol. II. of Hill's Code of the State of Washington, on December 1st. 1881, which section reads:—

"The period prescribed in the preceeding section for the commencement of action shall be as follows:—

Within ten years. 1.—Action for the recovery of real property. or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within ten years before the commencement of the action."

The decision of the State Court, if based on adverse possession, must of necessity have sustained the validity of this section, and in effect decided that this section deprived plaintiff in error of his property.

Murray v. Gibson, 15 How., 423.

Campbell v. Holt, 115 U. S., 620.

This question affirmatively appears to have been raised by demurrer, Printed record page 163, and by motion to strike testimony, Printed record page 56. It, of necessity, was passed upon in the decree, should this Court hold the decree based on adverse possession.

All the positions heretofore urged have been based on the assumption that this Court will not investigate the facts in dispute in the State Courts, but will take as conclusive the findings brought here.

In a law case this rule has been long established by an unbroken line of authority. In a chancery case, where the entire record, including all the evidence was before the highest tribunal of the State and on a trial *de novo*, as in the State of Washington, and is brought here we insist that a different rule prevails.

In *Murdock v. City of Memphis*, 20 Wall., 632, Mr. Justice Miller, speaking for the Court, says:—

"It was no doubt the purpose of Congress to secure to every litigant whose rights depend on any question of Federal law, that that question should be decided for him by the highest Federal tribunal if he desired it, when the decisions of the State Courts were against him on that question. That rights of this character guaranteed to him by the constitution and laws of the Union, should not be left to the exclusive and final control of the State Courts."

With a view to protect litigants in this right, this Court, where all the facts were before the State Court, and are here, has in chancery cases always examined into and decided all questions of fact upon the existence of which the Federal right rested.

In *Republican River Bridge Co. v. Kansas Pac. R. R. Co.* 23 U. S. Supt. Ct. Reb., 515, Mr. Justice Miller, speaking for the Court, says:—

"In chancery cases or in any other class of cases, where all of the evidence becomes part of the record in the highest Court of the State, the same record being brought here, this Court can review the decision of that Court on both the law and the fact, so far as may be necessary to determine the validity of the right set up under the act of Congress."

In *Dower v. Richards*, 38 U. S., Supt. Ct. Rep., 305, an exhaustive review of all the cases is had, this Court approving by implication at least, the language of Mr. Justice Miller, if confined to cases where the decree is general upon the whole record, and not disapproving his language if given its broadest significance.

In the case at bar, the decree is general, on the whole record and in fact there is no distinctive finding of fact.

The contention of plaintiff in error is that his property is taken without due process of law, and therefore, in conflict with the Fourteenth Amendment to the Constitution of the United States, and against an authority exercised under the United States. The contention of the defendant in error is that a title passed to its grantors by virtue of a power of attorney and deed executed under it, void in their inception, but infused with sufficient life by a retrospective act of the then Territory of Washington, to either be valid as a conveyance, or at least to afford a sufficient color of title to set the statute of limitation in motion. The existence in fact, and the introduction in evidence of this power of attorney and deed, is one of the facts upon which this case turns, and on which the Federal right rests. If in law there is no evidence of a power of attorney and the deed was improperly admitted in evidence, then no claim of title stands to support the decree of the lower Court, and plaintiff in error is manifestly deprived of his property against the validity of an authority exercised under the United States, as fully set up in the eighth assignment of error, Printed record page 193. That this right was claimed at all stages of the case is admitted by the record, page 1, and Exhibit A, page 107, and answer, pages 167 and 168.

The state of facts is peculiar, and we have been unable to find any ruling of this Court directly in point. Plaintiff in error claims title under authority from the United States, viz., a donation patent. He is met by an alleged power of attorney and deed, and nothing else. This power of attorney and deed, at the

time of their execution were, by the highest tribunal in the State of Washington, held absolutely void. Certificate of Chief Justice, printed record, page 187. A retrospective statute of necessity, must have been held to have given them life. To do this, however, a federal question, viz., the constitutionality of the statute, is raised. By sustaining the existence of the power of attorney, deed and statute; the Supreme Court of the State of Washington avoid and fail to pass on plaintiff in error's claim under authority of his patent Eliminate the power of attorney, deed and statute, and the patent must prevail. We insist that under the decisions cited, we are entitled to have this Court pass on the competency of the evidence of the power of attorney and deed.

No competent evidence can be found in the whole record that tends to prove the existence of a properly executed power of attorney. Defendant in error did not produce it, but simply attempted to prove its existence by oral proof. The authority to execute a deed must be by deed. 1 Devlin on Deeds, Sec. 356, Code of Wash., 1881, Secs. 2311 and 2312. The power of attorney must have been executed in accordance with the law governing the execution of deeds at that date. The Territorial act of 1854, Pamphlet Laws, pages 402, 444 and 448, was then in force.

Sec. 1.—Be it enacted by the Legislative Assembly of the Territory of Washington, that all conveyances of real estate, or of any interest therein, and all contracts creating or evidencing any encumbrance upon real estate, shall be by deed.

Sec. 2.—A deed shall be in writing, signed and

sealed by the party bound thereby, witnessed by two witnesses, and acknowledged by the party making it before a judge of the supreme court, a judge of the probate court, a justice of the peace or a notary public.

Sec. 3.—A married woman shall not be bound by any deed affecting her own real estate or releasing dower, unless she shall be joined in the conveyance by her husband, and shall apon an examination by the officer taking the acknowledgement, separate and apart from her husband, acknowledge that she did voluntarily of her own free will, and without the fear of or coercion from her husband, execute the deed, and the officer shall make known to her the contents of the deed, and shall certify that he has made known to her its contents and examined her separate and apart from her husband, as is above provided.

To make a deed valid it was required to be *signed* and *sealed* by the party, have *two witnesses*, and *be acknowledged before an officer authorized by the laws of Washington Territory, to take acknowledgements of deeds.*

To prove a lost instrument and its contents, it is necessary to establish:

A. Its execution, in accordance with the formalities required by law.

B. Its loss.

C. A thorough search in all places where it would probably be, and a failure to find it.

Not until these three pre-requisites have been clearly and strictly proven, can testimony of the contents of the instrument be introduced. Without these requirements, no man would be safe and all titles would be jeopardized. Fraud and perjury would be at a premium and written muniments of title would be of little value. Were they not necessary, proof of an

instrument could be introduced and a title to real estate established on an improperly executed instrument, which, if itself produced, would not be admitted in evidence.

All that a person holding an imperfect instrument would be required to do, would be to lose or destroy the instrument through which he could not claim by reason of its defects, and then testify as to its contents and rest sure of recovery. Such reasoning has lead the Courts not only to require these three pre-requisites to be proven, but has led them to require the most stringent proof of each.

13 Am. and Eng. Enc. of Law, pages 1088 and 1119, and cases cited in notes.

Logan v. Gardner (Penn.), 20 At. Rep., 625.

Johnson v. Ala. G. F. & M. Co. (Ala.), 8 So. Rep. 101.

Wakefield v. Day, 41 Minn., 344.

S. C., 43 N. W. Rep., 71.

1 Wharton on Evidence, 2nd Ed., Sec. 141.

Edwards v. Noyes, 65 N.Y., 125.

Elwell v. Cunningham, 74 Me., 127.

Lampe v. Kennedy, 56 Wis., 249.

Kearney v. New York, 92 N. Y., 617.

Metcalfe v. Van Benthuyaen, 3 N. Y., 424.

A.

The testimony offered by defendant in error fails to establish the due execution of a power of attorney. The only evidence offered on the subject is the testimony of Eldridge and Smith.

All Eldridge says on the subject is:—

Q—Did you make examination of the instrument at the time?

A—I did.

Q—What was the result of that examination as to the execution of power of attorney and substance which it contained?

A—It satisfied me that it contained all the requisites that power of attorney is supposed to have by law, witnesses, officer with seal.

Q—By whom signed. I don't mean what officer?

A—Betsey Jones. Printed record, page 20.

On cross-examination he testifies:

Q—You don't remember the date of that power of attorney; do you, Captain?

A—No sir.

Q—You spoke of a seal on that power of attorney in your testimony?

A—Yes sir.

Q—Did you refer to the seal opposite Betsey's name, or the notarial seal?

A—To the seal of the officer who acknowledged it.

Q—Do you remember his name?

A—I do not.

Q—Was there a seal in fact after the name of Betsey Jones?

A—I can't say whether there was a seal after the name of Betsey Jones or not.

Q—Was the notarial seal an impression on the paper, or was it a wafer stuck on and sealed?

A—Too much time has elapsed now for me to remember those details.

Q—Do you feel certain that it was a notarial seal?

A—No, sir, I do not know that it was a notarial seal. It may have been some other officer. The main point I felt interested was that it was a power of attorney from Betsey Jones covering the part of the land I was to purchase. The *details* I did not look into. I very often lose through not taking sufficient knowledge of the details of an instrument.

Q—Do you know whether or not it was the seal of any officer?

A—Yes, of some officer.

Q—You know that it was a proper seal without examining it?

A—I examined it sufficiently to find out how I was purchasing.

Q—You testified this instrument was signed by Betsey Jones. Are you familiar with her handwriting?

A—She did not write, sir.

Q—Then this deed was signed by her mark?

A—Her name was there in the manner it was in any instrument; her mark was there.

Q—There must have been some witnesses to that mark, were there not?

A—Not necessarily.

Q—Then there were no witnesses to this instrument?

A—Yes.

Q—Were there? Do you know how many?

A—Whether there was one or two, I can't say, but I was satisfied at the time that all the law required was there.

Q—Do you remember the names of the one or two witnesses?

A—No, sir, not even of the officer. Printed record, pages 28 and 29.

Q—You came here in 1853, I believe?

A—Yes, sir.

Q—From that time up to 1864-65 I understand you were taking up a Donation Claim and improving it?

A—Yes, sir.

Q—Prior to your coming here you were a sailor, were you not?

A—Yes, sir.

Q—That had been your means of procuring a livlihood?

A—Yes, until the gold mines were discovered in California.

Q—Then you worked in them?

A—Yes, sir. Printed record, pages 31 and 32.

Q—Are you an attorney at law?

A—No, sir. Printed record, page 33.

Smith testifies that Betsey sent a power of attorney; that he saw it, but never read it, and then says:

Q—Where was Mrs. Jones living at that time?

A—Living on the Caraboo Road.

Q—Is that at the place called the 145 Mile Post House?

A—Yes, at 145 Mile Post House.

Q—In British Columbia?

A—In British Columbia. I saw her afterwards myself, and she admitted it was right. Printed record, page 42.

On cross-examination, he says:

Q—Was Notary Public seal on it?

A—There was a seal on it.

Q—Notary Public?

A—I can't say I seen it though.

Q—How do you know it was a seal?

A—I can tell one when I see it.

Q—Can you tell a Notary Public seal when you see it?

A—Certainly I can.

Q—Are you prepared to say that it was a Notary Public seal?

A—I am prepared to swear that the Notary, Mr. Barkhouser, said it was, and said it was all right.

Q—You saw it yourself?

A—I saw it.

Q—You think it was?

A—Yes, certainly. Printed record, page 48.

This is all the testimony offered as to the proper execution of the power of attorney by respondent.

The testimony of several witnesses, printed record, pages 62–64 and 69–70 show that no proper officer, authorized to take acknowledgements of deeds, resided at or near where Betsey Jones then lived; that she was very poor, and that it would cost nearly as much for her to travel to a point where she could find a proper officer to acknowledge the instrument, as the one-half (her half) of the price alleged to have been paid for the land.

Such testimony can in no sense be said to prove the proper execution of the power of attorney.

The testimony of Eldridge is simply the expression

of his opinion, and without the laying of any foundation of his being qualified to express any opinion. In fact it is nothing.

Can it be contended that a sailor, a miner and a rancher, and one who is not an attorney at law, is a competent witness to pass on the validity of a legal document? He also admits that he did not look into the details. No stronger commentary of his incompetency need be urged than the fact that at that date a power of attorney from wife to husband was an *impossibility* and *void*, See *Infra*.

Again, the testimony fails to show that Betsey Jones even sealed the power of attorney, and without its being sealed it was void. Session Laws, 1854, page 402.

It required two witnesses to make a valid instrument, and Eldridge was unable to swear to that fact. The only fact on which he was positive, namely, that Betsey Jones could not write, but signed her mark, shows how little he knows of the *details* of the instrument, since shortly before that time she did execute two instruments by *writing* her name.

Exhibits 3 and 4. Printed record, pages 150–152.

There is absolutely no proof of a separate examination in the acknowledgement, which in itself is fatal. Session Laws, 1854, page 402, Sec. 3. See page 63 of this brief.

The instrument, according to the testimony, was never acknowledged at all. The attempt was made in British Columbia, but a Notary Public there had no

authority to take an acknowledgement. Session Laws, pages 402, 444, 448.

Any one of the above tests are fatal to a due execution of the power of attorney, and with this pre-requisite lacking, all testimony relative to the power of attorney should be stricken out.

B.

The testimony of Eldridge shows that *he* does not know where the power of attorney is, and that it is lost as far as he is concerned. No attempt is made to show that respondent does not know of its whereabouts, and for aught the record shows, the power of attorney may be safely stored in the archives of respondent company.

The presumption certainly would be that they have it among their title papers, and knowing its defects and inadmissability in evidence, keep it concealed and attempt to prove its contents without bringing to light the instrument which must defeat itself.

The loss of a paper of such importance as this should be proven beyond question. The failure to prove it must tell against respondent. If not in its possession, and actually lost, how easy to have procured the testimony! How grave the presumption by their failure to do so!

C.

Has the search for this instrument, alleged to have been lost, been of a thorough character and one sufficient to comply with the requirements necessary in such cases?

The only testimony on the subject is that of Mr. Eldridge. He says, referring to the time he received his

deed, and his conversation with Thomas Jones:

Q—Then what, if anything, was done about the production of power of attorney, after he told you he had it?

A—I asked him to show me the power of attorney and he did so. Printed record, page 20.

Q—State why the officer came to certify that the power of attorney from Betsey Jones to Thomas Jones was produced to him.

A—That was done at my request, and the reasons for it were these: While Mr. Barkhouser was writing out the deed, I stated to Mr. Jones that I wanted a power of attorney. His answer was that he was not yet done with it. He had more property to sell, and when he was through with it I should have it. I knew he had property in Port Townsend, and imagined he wanted to use it there. I immediately asked Mr. Barkhouser to make some statement in this acknowledgement that he had seen this power of attorney. I did not know that it was absolutely necessary to have power of attorney recorded, and I made that request of him, and he done so, and after he had written it he asked me if I was satisfied, and I said yes. I did not ask him for power of attorney when he returned, as I considered that authority good.

Q—When did you first learn that it was necessary in order to make a complete record to title that this power of attorney should be recorded?

A—About six years ago.

Q—What steps, if any, did you take or cause to be taken for the purpose of correcting that mistake?

A—As soon as I found it necessary to prove power of

attorney should be recorded, I immediately went to Port Townsend, as I thought most likely place it would be recorded, and examined personally and had others do so, and I went to British Columbia and had others employed to endeavor to find all the officers who would be likely to issue any documents, if any record could be found, and failed to do so.

Q–By Court—Have you been able to discover the whereabouts of this power of attorney you have referred to, or do you know now where it is?

A—I have no knowledge what became of it, sir.

Q—You stated a moment ago that some six or seven years ago it came to your knowledge about this power of attorney being necessary to be recorded. Did I understand you right?

A—Yes sir.

Q—Captain, where did Thomas Jones die?

A—In Bellingham Bay. Printed Record, page 38-41

This testimony shows conclusively that Eldridge made absolutely no search for the power of attorney itself. His only search was for a recorded copy of it and to find the officer who acknowledged it. This search was made six years ago. The law is that the search must be recent.

1 Wharton on Evidence, 2nd Ed., Sec. 142, and cases cited in note 1.

There is absolutely no proof that defendant in error ever attempted to find it.

The proof shows that the last place it was seen was in the hands of Thomas Jones, and that he died in sight of the land, and yet no application has ever been made

to his heirs or personal representatives. Without such an application, the proof of a proper search is insufficient.

1 Wharton on Evidence, 2nd Ed., Sec. 144.

The three pre-requisites to the introduction of secondary evidence of the contents of the power of attorney are all wanting. The failure of any one would be fatal. The conclusion, therefore, is inevitable that all testimony relating to the power of attorney is incompetent, and under the objections and motions made at the trial, must be stricken out.

With no proof of a power of attorney, the admission of the deed, Exhibit B, was clearly incompetent over the objections and motion to strike. Printed record, pages 2 and 3 and 55 and 56.

Should this Court find as a fact that no power of attorney or deed under it was proven, we contend that under the eighth assignment of error, we are entitled to a reversal.

Plaintiff in error contends that he is entitled to a reversal and respectfully asks for a decision reversing the decrees of the lower Courts and dismissing the action originally brought by defendant in error.

Respectfully submitted,

ALFRED L. BLACK,
E. B. LEAMING,
J. R. Crites

Solicitors for and of Counsel with Plaintiff in Error.

Office Supreme Court U. S.
FILED.
MAR 27 1896
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

TERM No. 230.

CARMI DIBBLE, PLAINTIFF IN ERROR,

vs.

THE BELLINGHAM BAY LAND COMPANY, DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

W. H. DOOLITTLE,
J. A. KERR,
E. S. McCORD,
Attorneys for Defendant in Error.

Filed this ..... *day of* ..... *A. D. 1896.*

..... *Clerk.*

(15,308)

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ARGUMENT.

I.

This Court is without jurisdiction. The alleged federal question arises upon an act of the Territorial Legislature of Washington. Acts of 1887, page 54, Sec. 4. This section appears in Vol. 1, Hill's Code of Washington, as Sec. 1447, and is referred to as such in the "Certificate of federal question." It remains in force as an Act of the Territorial Legislature by virtue of Art. 27, Sec. 2 of the Constitution of Washington, and has never been re-enacted by the Legislature of that state.

The doctrine of this Court is settled and uniform that under the Judiciary Act, "this Court cannot re-examine the decision of a state court that a law of a territory was not repugnant to the Constitution of the United States." The fact that the state

court held the statute of the territory, which provided for the validation of conveyances made by the husband under a power of attorney from his wife, valid, is of no importance in this case.

Miners Bank vs. Iowa, 12 How., 1.
Scott vs. Jones, 5 Ind., 343.
Messenger vs. Mason, 10 Wall., 510.
Gas Light Co. vs. Saginaw, 28 Fed., 532.

One of the contentions made by plaintiff in error in the state court was that the statute in question was void "because the laws of the Legislative Assembly of the Territory of Washington for the years 1887–8 containing this curative act, were never submitted to Congress for approval." This was unnecessary. Miners Bank vs. Iowa, *supra*.

II.

There is no federal question presented by the record in this cause. The determination of the powers of a married woman under the laws of the Territory of Washington in 1862, with reference to the disposition of her real estate, presents a question of which the state courts have exclusive jurisdiction; and it matters not what this Court may think of the correctness of the judgment of the state court with reference to such question, it will not review it.

In the first place the plaintiff in error has no standing in a court of equity to raise any of the objections urged in his brief, and had no such standing at any stage of the proceedings. An examination of the brief testimony in his behalf will disclose that his alleged grantors are not shown by any competent evidence to have been heirs at law of Betsy Jones, or, her privies in estate, or that plaintiff in error is a privy in estate, or the owner of any interest in the lands in controversy; and is therefore not in a position to urge a federal or any other question herein.

This is an action in equity to remove clouds cast upon the title of defendant in error to certain lands and to quiet its title

thereto. The plaintiff in error alleged title in himself by virtue of certain alleged conveyances from the sole surviving heirs at law of Mrs. Jones, and asked that the title to the property in controversy be quieted in him. Upon his affirmative defense, or cross-bill, issue was joined. Plaintiff in error alleged, that in April, 1862, Betsy Jones was the owner in fee simple of the land in controversy; that she had executed no other conveyance for said land than the power of attorney to her husband; that without any knowledge of said power of attorney he purchased from Mary Lovatt, Rosanna Carter, William Hill and Mary Wilkes, whom he alleges to have been the sole heirs of Mrs. Jones, the property in question, and he prays to be decreed the sole owner of said land.

In support of these allegations of title plaintiff offered the following testimony, and none other. Record, pp. 90-1-2-3-4-5-6-7-8, being the evidence of his solicitor:

Q. Where do you reside, Mr. Black?
A. Near the city of New Whatcom.
Q. Your occupation?
A. Attorney-at-law.
Q. Do you know, of your own knowledge, who were the heirs of Betsy Jones, deceased?
A. I do.
Q. State whether or not you are personally acquainted with them?
A. I am
Q. Who are they and where do they reside?
A. Betsy Jones died intestate, without children.
Q. You speak from your own personal knowledge?
A. I do. She left here, surviving one sister of the whole blood, named Mary Lovatt, residing at the present time, or at least in April last, on High street, Hanley, Staffordshire, England. She left also, three children of the deceased sister, named respectively, Rosana Carter, William Hill, Mary Wilkes; all residing in Hanley and suburbs, and they, together with the sister named, are the only heirs at law of Betsy Jones.

Mr. Leaming: The witness is handed defendant's Exhibits "1" and "2" and is asked whether he is the attesting witness whose name appears in these instruments.

A. I am.

Q. State whether these instruments respectively were signed by the parties purporting to have signed them in your presence?

A. Do you refer to the grantors in the deed?

Q. I do.

A. They were.

Q. State whether or not the grantors named in these deeds, Exhibits "I" and "II" of defendants are the same identical persons as you just named as the heirs of Betsey Jones deceased?

Mr. Thompson: We object, because it is incompetent and immaterial, as assuming the proof of a fact concerning which it is physically and absolutely impossible for this witness to know the truth or to state it — the heirship of these people.

Court: I will consider your objection with the others that I have not ruled on.

A. They are, with the exception of the three husbands who signed the deeds; the three women's names that appear as grantors, namely; Mary Lovatt, Rosana Carter, Mary Wilkes, and the man named William Hill are the identical persons that I named as heirs of Betsy Jones.

Q. The others are, respectively, the husbands of these parties? State what relation, if any, the other parties signing bear to the heirs?

A. Respective husbands. I would like to state that to these two deeds an acknowledgement——. The acknowledgements to each of these instruments are taken, or purport to be taken, before Michael Huntback, Mayor of Hanley.

Q. State whether you have any knowledge of this individual and the official capacity of this individual?

Mr. Kerr: We object as incompetent and immaterial.

A. These instruments were, each of them, acknowledged in the presence of myself and Michael Huntback, who took the acknowledgements. Michael Huntback, at the time of the taking of these acknowledgements, was the mayor of the borough of Hanley, Staffordshire, England, and was acting in that capacity.

Mr. Kerr: We move to strike out the last portion of the answer with regard to acknowledging officer being mayor of the province of Hanley, for the reason that it is not best evidence.

CROSS-EXAMINATION.

By Mr. Thompson:

Q. How long have you lived in the state and territory of Washington?

A. I am not positive as to the date I arrived in the territory of Washington; I left Cape May City, New Jersey, on the 6th day of September, 1889, came direct through; I think it was 13th or 14th day of month, I arrived in Seattle.

Q. Of what year?

A. 1889.

Q. About three years ago?

A. Not quite, a little over two years.

Q. How old are you?

A. I was 33 years old on the 16th of November last.

Q. Did you ever know Betsey Jones?

A. I never saw her.

Q. Do you know her?

A. By reputation.

Q. By reputation only?

A. I know more of her than by reputation.

Q. Did you ever have any personal acquaintance with her?

A. None other than that acquired by—— no personal acquaintance in the sense you ask — by personal contact.

Q. Did you ever see her?

A. No sir.

Q. Did you ever hear of her prior to three years ago when you came here?

A. I never did.

Q. All you know you learned since the date you came here three years ago?

A. What I have learned relative to Betsy Jones has been acquired in several ways.

Q. I will ask as to the time; all acquired since?

A. All since I came here.

Q. The general understanding is that she died several years prior to the time you came here?

A. The fact is she died some years prior to that time.

Q. About when did she die?

A. She died about 1866; there is some little dispute as to the exact date.

Q. You state of your own personal knowledge she is dead?

A. I do.

Q. How did you learn the fact?

A. I learned the fact by evidence, some of which is compe-

tent and some of which is not competent. Knowledge and personal knowledge are relative terms. You really know things by seeing them; by feeling them in many instances, and in numerous ways. I know personally that Betsey Jones is dead by reason of conversation with her intimate friends; with persons who knew her casually, by general repute, by affidavit.

Q. You are a lawyer by profession?

A. I am.

Q. How long have you been practicing?

A. Since November, 1881.

Q. You understand the difference between personal knowledge and facts?

A. I think I do.

Q. Do you not know what has been told you in various ways by other people is heresay?

A. It is not, according to legal writers on evidence.

Q. Who first informed you of Betsy Jones' death?

A. I don't remember; my impression is that it was Carmi Dibble, but I am not positive.

Q. About when did you first learn of her death?

A. Upwards of a year ago.

Q. How do you know of your own knowledge that Betsy Jones died intestate?

A. I possibly should have limited that statement to the fact that she died intestate so far as the county of Whatcom was concerned, although I believe my knowledge is personal, when I say she died intestate. I know she died intestate so far as Whatcom county is concerned, in that I have examined the records of Whatcom county, and find an application based on affidavits for the appointment of an administrator of the estate of Betsy Jones, and find that that proceeding is still pending and that no probate of any will in this county has ever been made or admitted, which in my judgment is knowledge of the fact so far as Whatcom county is concerned, she died intestate. I know by declarations made by members of the family of Betsy Jones, and all the immediate family of Betsy Jones, that she is so reported to have died. I know by declarations of other persons, by general repute, that she was reported to have died intestate. I should possibly have limited that statement to Whatcom county.

Q. You mean to say simply, there has been no will filed in Whatcom county and no probate of any will, so far as you know?

A. I have examined the records and found none, and that is intestacy until the will is proved.

Q. You procured these deeds concerning which you have been examined, did you?

A. What do you mean by the word procured?

Q. I mean, went to the place where the parties who executed these deeds lived, and negotiated for this property, representing Mr. Dibble, and made this transaction and procured the deeds in pursuance of transactions you had made?

A. I did.

Q. Where did you find the grantors named in these deeds?

A. You mean the general locality.

Q. The country and general locality.

A. I first found Mrs. Mary Lovatt at her house at the end of a little court on High street in Hanley.

Q. What country?

A. England, county of Staffordshire.

Q. Where did you find the others?

A. In the same locality. The country there is very thickly settled; they call the place Badley Hedge. It is the same relation as old Whatcom has to Sehome.

Q. How long were you there negotiating with these people for this tract of land?

A. I was not negotiating with them very long; I was there some three weeks; the time I was there was occupied almost exclusively in acquiring the knowledge I have testified to.

Q. You speak of having personal knowledge that these people were the heirs?

A. I have.

Q. Where did you get that personal knowledge?

A. From an examination of the records of the various parish churches in which Betsy Jones herself was married, and in which the various immediate members of her family were married; by declarations made to me by the rectors, vicars, and curates of the parishes, where they resided; by declarations made to me by the heirs themselves; by declarations made by members of the family and by the general repute of the community in which they resided. There may be other sources of knowledge that I have omitted; and also by examining old letters purporting to come from Betsy Jones to all parties, of which I spoke, in which she designated them by name, as her sisters, and one as a brother, who has since died, and by several family papers and one or two entries in the family Bible.

Q. How do you know that brother is deceased?

A. I know by declarations of members of the family and by the statement and certificate, or the certificate of death, of the entry in the book kept by the rector of the church.

Q. How much was paid to these grantors of these deeds for that?

A. At least the amount named as consideration in those deeds.

Q. At the most?

A. Unless called upon I will refuse to answer, as it is immaterial.

Mr. Thompson: I have a right; it goes to question good faith in the case.

Court: I will give him the privilege to answer the question.

Mr. Leaming: We decline to answer as to the excess over the amount named that he paid, but admit that an excess was paid.

Q. What, in your judgment, was the value of that claim at the time when these deeds were obtained?

A. I am not an expert on the value of real property.

Q. What is your best judgment on the subject?

Mr. Leaming: We object, as it is not cross-examination at all.

Q. You say there was an excess over and above the amount named in these deeds, paid at the time when the deeds were procured?

A. I so stated.

Q. What was the amount of that excess?

Mr. Leaming: We desire the witness not to answer, under privilege of the Court.

Court: I will give him the privilege to answer or not answer.

Exception given.

Q. Have you any interest in the result of this suit?

Mr. Leaming: We object to that as entirely immaterial, whether the witness has any interest or not.

Court: I will allow the question and give exception.

Q. Will you have any interest in the event of this suit?

A. I will receive compensation, if you call that interest.

Q. Will you receive compensation by way of interest in this land claim?

A. I refuse to answer.

Mr. Kerr: We insist on an answer.

A. I stand on privileges, your honor. I refuse to answer.

Court: The witness is required to answer, unless he thinks it will incriminate him. With that ruling—I think this is a case of that kind—I will allow the witness to answer the question; then he can answer or not.

Mr. Black: Do I understand the Court to say that the Court compels me, against my will, as attorney at law, acting as witness on the stand, to divulge that which I have acquired by reason of conference with my client?

Court: I simply ask you to answer the question as put by counsel on the grounds that I have named.

A. I will state that I cannot do so without divulging that which I have learned from my client. If you desire me, I will be compelled so to do.

Court: I will sustain the objection to that question no further. Note exception.

Q. State whether you yourself or your firm have a written agreement with Mr. Dibble concerning any interest in this land which you are to have as a contingent fee in this case?

Mr. Leaming: Same objection. The counsel object to the question.

Court: I instruct the witness at this time that he can answer or not answer, without further hearing on the question.

A. Neither I myself nor the firm of which I am a member have any written agreement with Mr. Dibble with relation to this suit. At least I have not, and the firm has not, to my knowledge.

Q. Are you not, as a matter of fact, to become a joint owner with Mr. Dibble in this property in the event of his recovery in this suit?

Mr. Leaming: Same objection as made to question before.

Court: I will instruct the witness to answer it or not answer it.

Exception given.

A. I am unable without disclosing confidences received by

me in the course of my business as attorney at law with my client to answer that question.

Q. What other persons, if any, beside yourself and Mr. Dibble, are to have an interest in this land in the event of its recovery in this suit?

Mr. Leaming: We object, as it is entirely immaterial.

Mr. Kerr: We want this record to show that counsel for the plaintiff insist upon the Court directing the witness to answer the question.

Court: You may answer that question.

A. Your Honor, I am unable to answer that question without disclosing confidences received by me as attorney from my client; if I am ordered by your Honor so to do, I can.

Court: I don't know but that he should answer the question. I give you the alternative to answer or not to answer. I want him to testify that; he cannot come in and claim that, because it is the same as a party who is brought upon the stand to testify in a criminal case—you can't force him to testify in the case.

I will permit the witness to answer.

A. At the request of Mr. Dibble, and under his instructions, I purchased this land in question from the heirs of Betsy Jones, and it was taken in his name. To my knowledge, there is no written agreement of any kind by Mr. Dibble with any person whereby any part of that land is agreed to be conveyed to anybody in the event of a favorable termination of this suit.

Q. Do you know whether any other person besides Mr. Dibble furnished any portion of the money which was paid for this land?

A. The money which was paid for this land was paid by Mr. Dibble.

Q. Do you know whether he got any portion of it from anybody else?

A. I don't know anything about Mr. Dibble's business.

Q. You stated there was no written agreement—is there any verbal agreement or tacit understanding that any person outside of Mr. Dibble shall have an interest in this land?

Court: I presume he can answer the question.

A. I was paid by Mr. Dibble a certain sum per week while I was gone and expenses, and what money was necessary for the acquiring of this title; there was no express understanding;

it was tacitly understood, however, that I was to receive a greater compensation in the event of success in finding them.

Q. That compensation was to be in lands from this claim, was it not?

A. I don't know that that was ever agreed upon.

Q. Was it not understood? Is not that the understanding you have now?

A. I said there was no written agreement.

Q. Is it not understood that you have interest in that land in the case of its recovery in this suit, as compensation for this suit?

Court: Let the record show that I will let the witness answer or not answer; and give exception.

A. I will say this: I have no expectation, present or future, to receive from Mr. Dibble anything other than certain charges that are entered on our books of account, and to be entered in the progress of this trial, and that I have no written agreement or any understanding, verbal or otherwise, whereby Mr. Dibble agrees to give me anything other than that.

Q. What proportion of the value of these lands do these charges cover?

A. I am not sure, exactly, what they amount to; I am of the impression that it runs about seventy-five dollars a day, time actually employed, on our books.

Q. What proportion of the value of this land will it amount to?

A. I don't know. I don't know what the land is worth.

Q. Who, if anybody, is interested in this matter besides Mr. Dibble, and explain the arrangements you have made concerning your own services?

A. Mr. Leaming is interested in half of my own services.

Q. Anybody else interested with Mr. Dibble in the matter?

A. Not that I know of.

Mr. Thompson: We make a motion to strike out all the testimony of this witness referring to the death of Betsy Jones, because it appears from the testimony of the witness, that the witness did not speak from personal knowledge, but from hearsay, and the evidence is not the best evidence or not competent evidence in the case.

Court: I will pass upon your motion with the other motions in the case. Not now, but at the time I pass on the others.

Mr. Thompson: The plaintiff further moves to strike out

the testimony of the witness concerning the fact of Mrs. Jones dying intestate, for the reason that it appears conclusively that the witness had no personal knowledge on that question, and that the whole of his testimony is hearsay and incompetent as evidence. The plaintiff further moves to strike out all of the testimony of the witness concerning the grantors to the defendant in the case being the heirs at law of Betsy Jones, for the reason that it conclusively appears that the witness had no personal knowledge on the subject, and that his entire testimony relating thereto was hearsay and not the best evidence and incompetent.

Court: I will pass on that with the others that I have taken under consideration in the case.

Mr. Black resumes:

A. I would like to state that one of the reasons for my asserting the intestacy of Betsy Jones, is the fact that to my knowledge twenty-five years have lapsed since her death, and no probate proceedings have been taken. I desire also to identify, before I leave the stand, certain papers that possibly may be offered in evidence.

Mr. Leaming: Papers to which you have testified relating to matters to which you have testified, as to heirship and relationship of these parties?

A. Yes, sir.

Mr. Thompson: I will move to strike out explanation of witness, for the reason that it is incompetent; no amount of reasons which can be assigned as tending to prove any personal knowledge on the part of the witness, of anything about which he has testified.

Mr. Leaming: We offer in evidence now the exhibits Nos. "1" and "2" on part of defendant.

Mr. Thompson: We make the objection to each deed specifically that it is incompetent and immaterial, in that the deeds are not properly proven, certified or acknowledged, and in that the persons who made the deeds are not shown to have any interest whatever in the property admitted to be conveyed by them.

Court: I will pass on that objection that is made same as the other objections.

This entire evidence is hearsay and utterly incompetent, and was rightfully so regarded by both the trial and the supreme

court. The witness, Mr. Black, had never even heard of Betsy Jones until about a year prior to this trial; she had then been dead for more than 26 years; she is said to have died in the Carriboo country, in British Columbia, where witness had never been; he had not visited the place of her death and burial, nor even conversed with anyone who witnessed her death, or who had ever seen her grave. The plaintiff in error, with a knowledge of the title of defendant in error, sent this witness to England, where he remained about three weeks, during which time he learned all he ever knew relative to the heirship of his client's alleged grantors. Then he claims to have purchased for six hundred dollars (see Deeds Record, pp. 45-47), property which plaintiff in error testified was worth $150 per acre, or $24,000 (Record, 106). With this alleged title, and with this superficial knowledge, in fact and of necessity hearsay, Mr. Black returned to Washington to overthrow the title of defendant in error.

Heirship cannot be proved by the declarations of third parties or even by members of the family, but it must be shown as a fact by competent evidence as other facts are shown.

Greenleaf on Ev., 134, et seq.

In the case of Thompson vs. Woolf, 8 Oregon, 455, we find an exact parallel to the case at bar. There Governor Gibbs, by whom testimony of heirship was sought to be established, gleaned his alleged knowledge in exactly the same way as the witness, Mr. Black, and it was declared utterly incompetent and insufficient upon which to base a finding of heirship.

Judge Boise, in the opinion of the Court, and following the line of authority upon this question, said:

"Declarations of a deceased person or persons out of the state, who are related to a family, may be admitted to prove pedigree. But before such declarations can be admitted the relationship of the declarant to the family must be proved by other evidence than his declarations."

See Wharton's Ev., Chap. 4, Sec. 218.

The Court further remarked:

"An agent cannot go forth to hunt an heir to a large estate and when he has found the supposed heir and evidence enough to convince them of the genuineness of the supposed relationship, come before a court and on his oral testimony, without producing the evidence which has convinced him, establish the pedigree. The whole testimony in this case amounts to simply this: That Governor Gibbs, in his correspondence, travels and searches, has found enough evidence to convince him that these persons who signed the deed are the relations of Finice Carrothers. But his opinion on this subject is not sufficient. The opinion of the witness is not evidence; we must go behind the opinion and look at the facts and judge for ourselves."

See Thompson v. Woolf, 8 Oregon, 455.

1 Greenleaf, 103.

30 Iowa, 301.

Wharton's Ev., Sec. 218.

It thus conclusively appears that, as a question of fact, nothing has been shown to warrant the belief that the grantors of appellant are heirs of Betsy Jones, and that, as a legal question, the attempt to show the fact was of such character as to make it incompetent for any purpose.

We are of the opinion that a fair and impartial examination of the record before the Court will show that this case belongs to a class of which there has been a large number in this country, where an unfair advantage amounting to fraud has been attempted to be taken of a technical flaw in a title.

It is not the case of heirs or children seeking redress for some wrong committed against the ancestor, but is a case that presents the disreputable feature of having been hunted up for purposes of speculation.

The heirs, if they be heirs, got but little out of it. The appellant, for reasons best known to himself, refused to state just how much he had invested in the matter, but about three thousand dollars in all.

This was the view of the case taken by the supreme court of Washington, and upon this view alone the decree should

have been affirmed. Under the evidence there was no privity of estate shown. The facts revealed would justify any court of chancery in bidding plaintiff in error to wash his hands.

III.

An examination of the opinion of the Supreme Court of Washington, record p. 181, will reveal that no federal question was, by that court, passed on. The contention of plaintiff in error is, that as a matter of fact, that court passed on an act of the Legislature of that territory, Sec. 1447, Vol. I, Hill's Code, acts of 1887, Sec. 4, p. 54, by which all conveyances theretofore made under powers of attorney, are legalized, and that such act contravenes the 14th Amendment of the Federal Constitution. In support of this contention he directs this Court's attention to the "Certificate of questions raised," record p. 187, signed by Mr. C. J. Anders, who at the time the opinion of that court was filed was ~~an associate and~~ concurring justice. The opinion of that court in this case was prepared by Mr. J. Dunbar, ~~and subsequently Mr. J. Anders became Chief Justice~~.

Defendant in error denies the right of Mr. C. J. Anders to make such certificate.

Felix vs. Scharnweber 8 S. C. Rep. 761.

Its effect is to overthrow the decision as expressed by the Court.

In Johnson vs. Risk, 137 U. S. 300, this Court say: "If he (plaintiff in error) wished to claim that this cause was disposed of by the decision of a federal question he should have obtained the certificate of the Supreme Court to that effect, or the assertion in the judgment that such was the fact." If one of the justices of that court can over-ride a decision by such a certificate he is greater than all of his associates. What right has he to bind the consciences or over ride the legally expressed views of the remaining members of that court? By the above language this Court did not contemplate that such Justice should undertake to perform a judicial act, or render

negatory the clearly expressed judgment of his associates. He was as powerless to do this as to render alone a binding and equal opinion in any appeal case.

It is true that plaintiff in error undertook to raise such constitutional question, but its determination by the lower court was wholly unnecessary. Whether Betsy Jones could execute a valid power of attorney in 1862, depended not upon statutes expressly granting such power to married women, but upon the enlargement of her civil rights by legislation touching married women generally. Did not the supreme court of Washington have the right to say, that in 1862, in this territory, the rigors of the common law relative to married women should be so far modified that she could deal with and through her husband? If that court had such right, this court will not stop to enquire whether its judgment is wise or unwise. There is an end of the matter. Under the old common law the wife could not be sued, else she could have been imprisoned for debt, and her children would have suffered; she was supposed to be under the absolute dominion of her husband, subservient to his will. Her legal existence was merged into his, and not being able to do any lawful act she could not delegate the authority to another to act for her.

At the time this power of attorney was executed, married women in this territory had been largely emancipated, and they had powers they never enjoyed at the time her legal nonenity obtained. The very property in question was a donation claim, patented to Mrs. Jones under the provisions of the Oregon Donation Act, Sec. 4, as amended, "to be held by her in her own right." At the same time patent issued to her husband for a like amount of land. Under the donation act the the wife's portion of the donation claim, being made her separate property, descended to her heirs, unaffected by any claim of the husband on account of marriage, directed by the common law.

Alexander vs. Knox, 6 Sawyer, 54.

Under the old common law, a married woman could not

dispose of her real estate by will; by statutes of Washington, 1854, p. 313, Sec. 3, she was given the power to dispose of any real estate held in her own right as she saw fit; so that at the time this power of attorney was executed Betsy Jones could have made a will disposing of the land in controversy. Notwithstanding the rigors of the old common law the courts have emancipated married women, until gifts made by the husband to the wife, during coverture, and her personal savings, which the husband allowed her to claim and use as her own, are held to vest in her, as against her husband, an unimpeachable right of property therein as her exclusive and separate estate.

1 Story Eq. Jur. (8th Ed.), Sec. 1375.
Shanning vs. Style, 3 Pierre Williams' Rep., 334.
Richardson vs. Merrill, 32 Vermont, 36.

The proceeds of the wife's labor invested by her, the property purchased becomes her separate property.

Peterson vs. Mulford, 36 N. J. L., 481.
Carpenter vs. Franklin, 14 S. W. Rep., 484.

A husband may surrender to a wife his right to her personal earnings.

Child vs. Pearl, 43 Vermont, 227.
Dixon vs. Dixon, 18 Ohio, 113.
Cutter vs. Butler, 25 N. H., 355.

Under the early common law of England the wife had no separate identity; could not contract; her personal earnings were her husband's; her chattels vested in him.

The next step in the gradual emancipation of the wife by judicial decision, independent of statutes, was made by our courts in holding that if a wife reduce to her possession her choses in action and with the money purchase land in her

own name, the title thereof vests in her as her separate estate, devisable by her will.

Standeford vs. Devoe, 21 Indiana, 404.
Stull vs. Fulton, 30 N. J. Law, 440.
Coffin vs. Morrill, 22 N. H., 357.

In Wisconsin it has been held, in a late case, that the husband might act as the agent of the wife in transactions affecting her real estate, and under power of attorney had authority to execute in her name a valid conveyance of her land. "If it is no violation of the common law principle of the unity of husband and wife for the wife to act as the agent or attorney of her husband, the conclusion would seem irresistibly to follow, that it is no infringement of the same principle to allow the husband to act as the agent of the wife in cases where by law she is *sui juris* and capable of acting for herself. At common law the separate existence of the wife was for many purposes merged in that of the husband, and she could do no act. Incapable of acting for herself, she could not appoint another to act in her stead. * * * The disability of the wife has in many respects been removed by statute, and she is now capable of acting not only by herself, but by an agent with no express limitation upon her power of appointment. If the doctrine of unity does not stand in the way, as it seems it can not, then we see nothing to prevent her making her husband her agent whenever she chooses to intrust him with the management of her affairs."

See Weisbrod vs. The Chicago & N. W. Ry. Co., 18 Wis., page 40.

Gradually, by both legislative enactment and judicial construction, the legal entity of married women has become established and the rigors of the common law overthrown. Prior to 1862 in this territory, the wife could not only hold real estate, but could will it, or convey it by deed, her husband joining.

Laws of 1854, p. 219, Sec. 492, (re-enacted 1859, p. 100, Sec. 486: She could contract without joinder of her husband. "A married woman may sue and be sued, plead and be impleaded, without joining or having her husband joined with her in the action."

Laws Washington 1861, p. 51, and re-enacted in 1862, p. 88, Sec. 6: The early statutes of Washington (1859, p. 291, Sec. 11) recognized coverture as a disability and therefore a bar to the running of the statute of limitation.

The act of 1860, p. 61, amended the act of 1859 by striking coverture from the exceptions. This amendment was carried into the practice act of 1862, p. 87, Sec. 26, and has since been the law.

Laws 1859, p. 5, Sec. 1: "All common law forms of action, and all distinctions between law and equity are hereby abolished."

This legislation materially changed to her advantage the status of a married woman in Washington Territory.

From the foregoing, it is manifest that in 1862 most of the rigors of the common law had been broken; partly by statutes and partly by judicial construction. If there is any reason why our Supreme Court have not the right to say that a married woman holding property "in her own right," with power given her by statute to will, sell and deed it, could not if she chose, empower by a power of attorney, executed in due form, her husband to do so for her, is hard to understand. Suppose the Supreme Court took this view of the matter; it is conclusive and this Court is without jurisdiction.

IV.

If the state court did pass on the validity of the act of 1887, and if that court held such act to be valid, its holding was correct. The territorial legislature had the power to pass such statute. The contention is that the effect of the Fourteenth Amendment to the Federal Constitution was to greatly abridge the powers of the states. Emancipation brought about the nenessity for it. Its primary object, as declared by this Court in U. S. vs. Harris, 106 U. S. 629, was to protect the citizen from hostile legislation. The Fourteenth Amendment, as it affects property rights, does not enlarge upon the provisions of the fifth. "No person shall be deprived of life, liberty or property

without due process of law;" "nor shall any state deprive any person of life, liberty or property without due process of law."

Mr. Justice Miller, in Davidson vs. New Orleans, 96 U. S. 97, says:

"The prohibitions against depriving the citizen or subject of his life, liberty or property without due process of law is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the Fourteenth Amendment in the year 1866. In the series of amendments to the Constitution of the United States, proposed and adopted immediately after the organization of the government, which were dictated by the jealousy of the states as further limitations upon the power of the Federal Government, it is found in the fifth, in connection with other guarantees of personal rights of the same character."

After further discussion, in which it is shown that the principles involved in the Fourteenth Amendment were fully embodied in and contemplated by the Fifth Amendment, Justice Miller concludes:

"It is not a little remarkable that, while this provision has been in the Constitution of the United States as a restraint upon the authority of the Federal Government for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum. But while it has been a part of the Constitution, as a restraint upon the powers of the states, only a very few years, the docket of this Court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this Court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the

merits of the legislation on which such a decision may be founded."

Such acts are not only *not* unconstitutional, but are highly commended by the highest judicial authority.

See Cooley's Const. Lim., 376.
Sedwick Stat. and Const., 183.
Watson vs. Mercer, 8 Pet., 110.
Satterlee vs. Mathewson, 2 Pet., 380.
Savings Bank vs. Allen, 28 Conn., 97.
Randall vs. Krieger, 23 Wall., 137.
Barton vs. Morris, 16 Ohio, 425.

Mr. Cooley, in his work on Constitutional Limitation, quotes from Savings Bank vs. Allen, 28 Conn., page 97, the following:

"That where a statute is expressly retroactive and the object and effect of it is to correct an innocent mistake, remedy a mischief, execute the intention of the parties and promote justice, and both as a matter of right and of public policy affecting the peace and welfare of the community, the law should be sustained."

In Randall vs. Krieger, *supra*, the husband acted as attorney in fact for the wife in conveying real estate; the Court says:

"When the power of attorney was given, there was no law of Minnesota authorizing such an instrument to be executed by husband or wife, or the attorney to convey under it. On the 24th of February, 1857, the Legislature of Minnesota, then a Territory of the United States, passed an act which is as follows: 'A husband and wife may convey, by their lawful agent or attorney, any estate or interest in any lands situate in this territory; and all deeds of conveyance of any such lands, whether heretofore or hereafter made under a joint power of attorney from the husband and wife, shall be as binding and have the same effect as if made and executed by the original parties.' * * * It is not objected that the act of 1857, as regards its application to the present case, is in conflict with the constitution of the state. We have carefully examined that instrument and have found nothing bearing upon the subject. Nor was the act forbidden by the Constitution of the United States. There is nothing in that instrument which

prohibits the legislature of a state or territory from exercising judicial functions, nor from passing an act which divests rights vested by law, provided its effect be not to impair the obligation of a contract. Contracts are not impaired, but confirmed, by curative statutes. * * * The power of a legislature, under the circumstances of this case, to pass laws giving validity to past deeds which were before ineffectual, is well settled. In Watson vs. Mercer, *supra*, the title to the premises in controversy was originally in Margaret Mercer, the wife of James Mercer. For the purpose of transferring the title to her husband, they conveyed to a third person, who immediately conveyed to James Mercer. The deed of Mercer and wife bore date of the 30th of May, 1785. It was fatally defective as to the wife in not having been acknowledged by her in conformity with the provision of the statute of Penn. of 1770, touching the conveyance of real estate by femes covert. She died without issue. James Mercer died leaving children by a former marriage. After the death of both parties, her heirs sued his heirs in ejectment for the premises and recovered. The supreme court of the state affirmed the judgment. In 1826 the legislature passed an act which cured the defective acknowledgment of Margaret Mercer, and gave the same validity to the deed as if it had been well executed originally on her part. The heirs of James Mercer thereupon sued her heirs and recovered back the same premises. This judgment was also affirmed by the supreme court of the state, and the judgment of affirmance was affirmed by this court. This case is conclusive of the one before us. To the objection that such laws violate vested rights of property, it has been forcibly answered that *there can be no vested right to do wrong. Claims contrary to justice and equity cannot be regarded as of that character.* Consent to remedy the wrong is to be presumed. The only right taken away is the right to dishonestly repudiate an honest contract or conveyance to the injury of the other party. Even where no remedy could be had in the courts, the vested right is usually unattended with the slightest equity. * * *

"The curative act of 1857 has a strong natural equity at its root. It did for her what she attempted to do, intended to do, and doubtless believed she had done, and for doing which her husband was fully paid. * * * The act accomplished what a court of equity, if called upon, would have decreed promptly as to the husband, and would have failed to decree as to the wife only from the want of power. The unbending rule of

law as to femes covert in such cases would have prevented it. The legislature thus did what right and justice demanded, and the act strongly commends itself to the conscience and approbation of the judicial mind."

In Satterlee vs. Matthewson, *supra.*, Mr. Justice Washington, in speaking of a curative act of this character, says: "Is the act which is objected to repugnant to any provision of the constitution of the United States? * * * It is true that the supreme court of the state decided, in the year 1825, that this contract, being entered into with a person claiming under a Connecticut title was void. * * * But the legislature afterwards declared by the act under examination that contracts of that nature are valid. * * * We are then led to inquire whether the obligation of the contract between Satterlee and Matthewson was impaired by this statute. The objections urged at the bar, and the arguments in support of them, apply to that contract if to either. It is that contract, which the act declared to be valid, in opposition to the decision of the supreme court; and admitting the correctness of that decision, it is not easy to see how a law which gives validity to a void contract, can be said to impair the obligation of that contract. Should a statute declare, contrary to the general principles of law, that contracts founded upon an illegal or immoral consideration which were in existance at the time of passing the statute, or which might hereafter be entered into, should nevertheless be valid and binding upon the parties, all would admit the retrospective character of such an act, and that the effect of it was to create a contract between parties where none had previously existed. But it surely cannot be contended that to create a contract and to destroy or impair one mean the same thing. * * * The objection, however, which was most pressed upon the Court, and relied upon by the counsel for the plaintiff in error, was that the effect of this act was to divest rights where vested by law in Satterlee. There is certainly no part of the Constitution of the United States which applies to a state law or this description; nor are we aware of any decision of this or of any Circuit Court which has condemned such a law upon this ground; provided its effect be not to impair the obligation of a contract; and it has been shown that the act in question has no effect upon either of the contracts which have been before mentioned."

The rule in regard to curative statutes is that if the thing omitted or failed to be done, and which constitutes the defect

sought to be removed or made harmless, is something which the legislature might have dispensed with by a previous statute, it may do so by a subsequent one. If the irregularity consists in doing some act, or doing it in the mode which the legislature might have made immaterial by a prior law, it may do so by a subsequent one.

Sutherland, State Const., 483.

The Satterlee case was commented on by Mr. Justice Miller in his lectures on the Federal Constitution delivered in the law school of the National University in 1889-90 (Miller on the Const., p. 537-9), and he cited it as "the best illustration of a valid retrospective law" and recognized its full force in the light of the 14th Amendment. He also recognizes that Watson vs. Mercer, *supra*, is binding on the courts.

V.

The decision of the Supreme Court of the State of Washington was placed in express terms, upon the ground of adverse possession on the part of defendant in error. And there was no Federal question involved in its determination. Conceding, for the moment, that a wife had no power under the laws of the Territory of Washington, to convey her separate property in 1862, and that the deed was insufficient to pass title, still the effect of the decision extended to the adoption only of the principle that the statute of limitation is set in motion in behalf of one who holds possession of property under a void deed. However unwise such a policy may be, this Court will not inquire into or modify it. This doctrine is, moreover, the settled law of the State of Washington as announced by the Supreme Court, in this and subsequent decisions.

In the case of McAuliff vs. Parker, 10 Wash., 141, the Court cite with approval the doctrine laid down by Judge Cooley in Sparrow vs. Hovey, 6 N. W. Rep., 93, in which he says: "In this case defendant having shown his possession for the requisite length of time, under tax titles which are now conceded to be invalid, was suffered to prove that the land was

generally understood to be and called his, in the neighborhood," and to establish his title by adverse possession.

Again, in Moore vs. Brownfield, 7 Wash., 26, it was held that "The objection that possession without color of title so as to entitle the possessor to the benefit of the statute of limitations is not well taken. Actual uninterrupted and notorious possession under claim of right is sufficient, without color of title." No distinction is made as is manifest from these decisions as to whether the possessor claims by adverse possession under a void instrument or not. The instrument in question may have been invalid for many reasons. It is immaterial to the plaintiff in error, in the light of these decisions whether the act of 1887-8 contravened the Federal Constitution or not. Even if the Supreme Court of Washington had expressly held that such act was unconstitutional and a nullity, the decision must have been the same.

The overwhelming weight of authority in this country supports the doctrine of the Washington Court.

And this Court in the case of Probst vs. Trustees of Board of Domestic Missions, etc., 11 Sup. Ct. Rep. 263 on writ of error to the Supreme Court of the Territory of New Mexico, say:

"Obviously the proposition here set out by the Court is, that if plaintiff had the real title to the land, and the evidence of it was on record, nobody could by taking possession and holding it adversely for the period allowed by the statute, defeat such a title. The language used by the Court is: 'Unless the defendant had a right to the possession of such lands when he took possession of them, he has no right now; time never makes a wrong right.' It is the essence of the statute of limitations that whether the party had a right to the possession or not, if he entered under the claim of such right, and remained in possession for the period of ten years, or other period prescribed by the statute, the right of the action of the plaintiff who had the better right is barred by that adverse possession. This right given by the statute of limitations does not depend upon and has no necessary connection with the validity of the claim under which that possession is held. Otherwise there could be no use for adverse possession as a defense to an action,

for if the decision is made to depend upon the validity of the respective titles set up by the plaintiff and the defendants, there can be no place for the consideration of the question of possession. It is because the plaintiff has the better title that the defendant is permitted to rely upon such uninterrupted possession adverse to the plaintiff's title as the statute prescribes, it being well understood and an element in such cases, that the plaintiff does have the better title, but though he has it, he has lost his right by delay in asserting it. Nor is it necessary that defendant shall have a paper title, under which he claims possession. It is sufficient that he asserts ownership of the land, and that this assertion is accompanied by an uninterrupted possession. It is this which constitutes adverse possession, *claiming himself to be the owner of the land.* This is a claim adverse to everybody else, and the possession is adverse when it is held under this claim of ownership, whether that ownership depends upon a written instrument, inheritance, a deed, or even an instrument which may not convey all the property in controversy. If defendant asserts his right to own the land in dispute, asserts his right to the possession, and his possession is adverse and uninterrupted, it constitutes a bar which the statute intended to give to the defendant. The instructions of the court are utterly at variance with this doctrine. They do away with the value of adverse possession as a defense to all actions of ejectment. They say, in effect, that unless the defendant was in the right when he took possession, the length of its continuance does not afford him any ground for a defense, where as it is obviously the nature and purport of the defense established by the statute of limitations that the defendants may not have been in the right, but this long actual possession estops the plaintiff from putting the defendant to the proof of the right."

In referring to the language of this court in Ewing vs. Burnett, 11 Pet., 41-52, and Harvey vs. Tyler, 2 Wall., 328-349, this court says:

"The fair implication in both these cases is that where possession is taken under claim of title, it sufficiently shows the intention of the party to hold adversely within the meaning of the law upon that subject. There is no case to be found which holds that this adverse claim of title must be found in some written instrument."

Probst vs. Trustees, Etc., 11 Sup. Ct. Rep., 264.

In the case at bar the Superior Court of Whatcom county, Washington, the trial court, held:

"That on the 28th day of March, 1862, the said Eldridge (defendant in error's grantor) intered into possession of all of the said donation claim of Thomas Jones and Betsy Jones, and from that date to the present time (1892) the said Edward Eldridge and his grantees, including the plaintiff in this case, have been continuously and now are in the actual, open, notorious and adverse possession of all of the said property under claim and color of title." Printed Record, p. 172.

With this finding of the trial court and its affirmance by the Supreme Court of the State of Washington it becomes apparent, without further investigation, that the validity of the curative act of 1887 and 1888 was wholly unnecessary to the determination of the effect of the defense or adverse possession as a bar to the claims of the plaintiff in error. For the Court expressly finds that that possession was for a length of time greater than that prescribed by the statute was adverse, open and notorious, and that Eldridge entered into the possession with the intention of becoming the owner, and upon the payment of a sufficient consideration. And it makes no difference whether the deed executed by Thomas Jones as attorney-in-fact for Betsy Jones was void or voidable. It makes no difference whether a deed was even executed or not. "There is no case which holds that this adverse claim of title must be found in some written instrument."

Under substantially all the authorities the character and validity of the instrument under which the entry was made, is eliminated and the "whole inquiry reduced to the fact of entering, and the intention to usurp possession."

Bradstreet vs. Huntington, 5 Pet., 402, 439.
Probst vs. Trustees, etc., supra.

This adverse possession was also well known to defendant in error before his attempted purchase of the land in controversy.

Printed Record, pp. 103-104.

"The intention guides the entry, and fixes its character.

That the evidence in this case justified the jury in finding an entry by the defendant on this lot as early as 1804, cannot be doubted; nor that he claimed the exclusive right to it under color of title, from that time till suit brought. There was abundant evidence of the intention with which the first entry was made, as well as of the subsequent acts related by the witnesses, to justify a finding that they were in assertion of a right in himself; so that the only inquiry is as to the nature of the possession kept up."

Ewing vs. Burnett, 11 Pet., 332.

The inquiry in the case at bar is likewise restricted to the nature of the possession kept up. There is no question as to the intention with which the entry was made.

Printed Record, 172-173.
Opinion Court, Printed Record, 183.

It will not be questioned that the courts of any state have the exclusive authority to adopt any rule that may be deemed expedient, which will constitute a sufficient claim of ownership to set the statute in motion. In fact the rules in many of the states are different. The matter is purely local, peculiarly within the province of the state courts, and we are unable to conjecture in what manner a Federal question can be interposed.

In Illinois, in Flaherty vs. McCormick, 113 Ill., 548, where possession was taken without paper title, by one claiming adversely to the owner of the property who held paper title for a period of twenty years, it was said: "We are aware of the fact that it has been held by some courts of last resort that possession of lands to be availing must be taken and held under color of title; but such is not the rule in this state. This court has held, in a number of cases, that actual occupation for a period of twenty years, under claim of ownership, is sufficient to bar an action brought by the party holding the title."

Horner vs. Renter, 38 N. E., 749.
Weber vs. Anderson, 73 Ill., 440.
Hubbard vs. Stearns, 86 Ill., 35.
Schneider vs. Bolsch, 90 Ill., 557.

In East Tennessee Iron and Coal Co. vs. Wiggin, 68 Fed. Rep., 449, it was held that a void sheriff's deed was sufficient to set the statute of limitation as to adverse possession in motion. The sheriff's deed to Williams, though void as a conveyance of McCoy's title, was operative as an assurance of title.

Plaintiff in error, however, contends that the rule is different where the instrument is a nullity and shows on its face that there was no competent grantor and was invalid on its face.

He cites in support of his contention the case of Smythe vs. Henry, 41 Ind., 708. This case is not in point and the language in his brief at page 39, is at best only dictum. The court in that case at page 709, says:

"There are numerous decisions in the courts which declare that a void and worthless deed will constitute color of title that will have operation under statutes of limitations but such deeds were void for other causes than those which contravene an express prohibition of a statute, or some well established policy of the law. I will not further discuss this question, for conceding that the deed to Sherrell was color of title, he did not have the continuous possession to ripen his colorable title into a complete title."

Therefore, the validity of the deed was not a question in issue. Sherrell did not have actual and continuous adverse possession, as the defendant in error in this case had.

Moore vs. Brown, 11 Howard, 425, is cited for the same purpose by plaintiff in error at page 39 of his brief but that was decided under a statute of limitation of the State of Illinois entirely different from the statute of the State of Washington. The Illinois statute is found in Revised Statutes of Illinois, 1845, p. 349, and is as follows:

"Every real, possessory, ancestral, or mixed action, or writ of right, brought for the recovery of any lands, tenements or hereditaments, of which any person may be possessed by actual residence thereon, having a connected title in law or equity *deducible of record from this state or the United States*, or from any public officer, or other person authorized by the laws of the state to sell such lands for the non-payment of taxes or

from any sheriff, marshall, or other person authorized to sell land upon execution, or any order, judgment or decree of any court of record, shall be brought within seven years next after possession being taken as aforesaid."

The statute in express terms disposes of this question, and the Court says:

"Before the limitation of the act can operate, it must be shown by one claiming its protection, that he has been in actual possession of the land to which it is sought to be applied for seven years before the commencement of a suit by a connected title in law or equity; deducible of record from the state or the United States, or from any public officer or other person authorized by law to sell land for nonpayment of taxes."

This was a case in which the party in possession claimed under a tax deed from an officer, who sold the land short of the time prescribed by the statute, consequently the party in possession failed because he could not show a connected title from the state. But no such statute appears in this case.

In Redfield vs. Parker, 132 U. S., 225, the distinction is clearly drawn between the rights of a party claiming by adverse possession under the general statutes of limitations and of one claiming under what may be called short statutes of limitations, the object of which latter statutes is to protect rights acquired under sales of real estate for taxes. The cases are numerous which have been decided by the courts under these short statutes of limitations in connection with tax sales, and Judge Miller in Redfield vs. Parks, *supra*, says:

"The general principle prevading them is well expressed by the court of appeals of Kentucky, in the case of Trustees vs. Payne, 3 T. B. Mon., 161, in which the court says: 'Instead of twenty years mentioned in the general act, but seven are required by the act of 1809; but, to form a bar to an action, something more is required by the latter act than an adverse possession for seven years.'"

Defendant in error is asserting his right to avail himself of the bar of the statute under the general statutes of limitation of the State of Washington, and not under the short statute relating to the sale of lands in connection with the collection of taxes.

We find the same distinction adopted by the Supreme Court of Washington in Hurd vs. Brisner, 3 Wash. 1, cited by plaintiff in error, in support of his contention that a void instrument will not set the statute in operation. The statute of limation involved in that case was a short statute of limitation, and is found in the acts of the Territory of Washington for 1869, and provides:

"Any suit or proceeding for the recovery of lands sold for taxes, except in cases where the taxes have been paid or the land redeemed, as provided by law, shall be commenced within three years from the time of recording the tax deed of sale, and not thereafter."

And, further, there was no claim that the purchaser or holder of the tax deed was in possession of the premises. Therefore the case has no bearing upon the question as to whether a void deed will start the statute under the general statute of limitations of the State of Washington.

Besides the Supreme Court of Washington, in Ward vs. Huggins, 7 Wash. 624, reviewing Hurd vs. Brisner, holds that a tax deed void upon its face will sustain the bar of the statute even in sale of lands for taxes, where the holder of the tax deed is *in possession* for the requisite length of time prescribed by the statute. The Court says:

"If it were a void instrument it would still coustitute such color of title in the respondent as would sustain the bar of the statute of limitations provided for actions relating to tax deeds. The respondent in this case is in possession, claiming title under his tax deed, and under such circumstances it is not necessary that his deed should be regular or valid, but only sufficient to afford color of title. In fact, in cases of adverse possession even color of title is unimportant, except as a means of determining the extent and limits of the possession of the claimant. Title to real estate may be acquired by a disseizor who holds under a claim of right for the period prescribed by law; but in such cases, having no proper title, he can successfully claim only so much of the premises as are actually in his possession."

2 Blackwell on Tax Titles (5th Ed.), 861.
Coulter vs. Stafford, 48 Ind. Rep., 266.

Edgerton vs. Bird, 6 Wis., 527.
Knox vs. Cleveland, 13 Wis., 245.
Oconto Co. vs. Jerrard, 46 Wis., 317.
Lindsey vs. Troy, 25 Wis., 317.
Pillen vs. Roberts, 13 How., 477.
Galling vs. Lane, 17 Neb. 77.
Chicago, etc., R. R. Co. vs. Alfree, 64 Ia., 500.

The doctrine is firmly established, therefore, in the State of Washington, that color of title is not required to set the statute of limitations in motion, where the party claiming adversely is in actual, adverse possession for the time required by the statute. Such being the case, it was unnecessary for the Supreme Court of the State of Washington to pass upon the validity of the act of 1887-8; it was immaterial whether that act contravened the Federal Constitution or not. The decision could be and was based solely upon the question of adverse possession just as it states. And this Court is without jurisdiction for the want of a Federal question. Suppose the Washington Court had sustained the contention of plaintiff in error and had held that the act of 1887 and '8 did contravene the provisions of the 14th Amendment to the Constitution of the United States, the effect would have been to hold the deed executed under the power of attorney void the result would not have deprived the defendant in error of his right to invoke the bar of the statute of limitations. The adverse possession of defendant in error and its grantors for thirty years would nevertheless have ripened into a perfect title.

VI.

The Supreme Court of the United States in its decisions has followed the construction of the statute of limitation given by the State Court from which the case came, wherein the question had been previously passed upon by the State Courts.

"No laws of the several states have been more steadfastly or more often recognized by this Court, from the beginnig as rules of decision in the courts of the United States, than statutes of

limitations of actions, real and personal, as enacted by the legislature of a state, and as construed by its highest court."

Balham vs. Woodstock Iron Co. 14 Sup. Ct. Rep. 104.
Bauserman vs. Blunt, 147 U. S. 647 and cases cited.

"In Patton's Lessee vs. Easton, 1 Wheaton, 478, and again in Powell's Lessee vs. Harmon, 2 Pill, 241, this Court had construed a Tennessee statute of limitations of real actions in accordance with decisions of the Supreme Court of the state, made since the first of these cases were certified up to this Court and supposed to have settled the construction of the statute. Yet in Green vs. Neal's Lessee, 6 Pet., 291, a judgment of the Circuit Court of the United States which had held itself bound by these cases in this Court was reversed because of more recent decisions of the state court establishing the opposite construction."

Consequently this Court is bound by the decisions of the Supreme Court of the State of Washington as to what will set in operation the statute of limitations for the recovery of real property. And it will follow the latest expression of opinion of that Court in Ward vs. Huggins, 7 Wash., 624; in Moore vs. Brownfield, 7 Wash., 26, and in McAuliff vs. Parker, 10 Wash., 141.

VII.

Counsel for plaintiff in error have discussed the merits of this controversy. As we view the matter such discussion has no place in this case. In order that this Court be clothed with jurisdiction it must be held:

1st. That a federal question was in fact involved and actually passed on.

2d. That this cause could not have been determined in the State Court without passing on such question.

3d. That the decision of this question by State Court was erroneous.

Now the contention is that the act of 1887 is unconstitutional and void; that the power of attorney from Betsy Jones to her husband was void; that a conveyance made under such void instrument is void and affords defendant in error no

color of title upon which to base an adverse possession. Now in order that this Court assume jurisdiction at all this full contention must be sustained and this Court must hold that plaintiff in error is shown to be a privy in estate. In other words the defendant in error would be held to have failed on the ground that the statute of limitations had never been set in motion.

The contention of plaintiff in error, based on the merits must assume that the statute of limitations was set in motion. His contention is in fact that if it was it began to run only from the date of the issuance of the patent. If for the sake of the argument this should be granted, and the courts are divided on the proposition, certainly the state court had the right to base its decision on such question, and right or wrong this Court under numerous decisions will not review it.

The evidence shows that the land in controversy was entered in 1855. The final proofs had been made and Mrs. Jones left the territory in 1862; her right to the patent had matured prior to that date, and its execution became the mere ministerial act of the proper officers.

Stark vs. Starrs, 6 Wall., 402.
Barney vs. Dolph, 97 U. S., 652.
Simmons vs. Wagner, 101 U. S., 260.

Under the laws of the territory the donation entryman had the right to convey the claim.

In Gibson vs. Chateau, 13 Wall., 92, cited by plaintiff in error, the party seeking to set up the statute did not in any way connect himself with the title or right of the party claiming under the patent, and at a time when the right to a patent *had not accrued.*

The rule is absolute that where the right to a patent has accrued the statute is set in motion.

Cromder vs. Smith, 56 A. D., 541.
Knight vs. Leary, 11 N. W. Rep., 600.
Cody vs. Emery, 7 N. W. Rep. 102.

Udell vs. Peak, 7 S. W. Rep. 786.
Nicholls vs. Council, 9 S. W. Rep. 305.
Steele vs. Boley, 22 Pac. Rep. 311.
Carroll vs Patrick, 37 N. W. Rep. 676.

The defendent in error respectfully submits that this Court is without jurisdiction, that the writ of error should be dismissed or the cause affirmed.

W Lair Hill

James A Reed

Attorneys for Defendant in Error.

Office Supreme Court U. S.
FILED.
APR 14 1896
JAMES H. McKENNEY,
CLERK.

(15,308.)

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

Term No., 230.

CARMI DIBBLE, PLAINTIFF IN ERROR,

vs.

THE BELLINGHAM BAY LAND COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

W. LAIR HILL,
J. A. KERR,
Attorneys for Defendant in Error.

Filed this — day of ——, A. D. 1896.

—— ——, *Clerk.*

I.

By the provisions of section 4 of the Oregon donation act there was granted to every white settler, possessing certain qualifications, 160 acres of land. If such settler were married, a like amount of land was granted to his wife, "*to be held by her in her own right*," and the surveyor general was directed by the act "to designate the part inuring to the husband *and that to the wife* and enter the same on the records of his office." When final proofs were made, patent issued to the wife for her separate portion of the land. The act provided for the descent of the land in case either spouse died intestate, and that either could devise his or her claim.

In passing on this section and the nature of the estate held by the marriage community, Judge Deady in Fields *vs.* Squires, 1 Deady, 376, and the supreme court of Oregon in Carter *vs.* Chapman, 2 Ore., 95, held:

"That one-half of the land taken by a married settler, be it more or less, inures to the benefit of his wife, and that *she takes the same in her own right as the direct donee of the United States.*"

Plaintiff in error claims to have obtained deeds from the heirs of Betsy Jones for the entire claim, including that patented to the husband. For some reason he filed a disclaimer as to the husband's half of the claim, and at the trial entered into a stipulation (Record, p. 1) that defendant in error have a decree quieting its title to the husband's portion of the claim in accordance with the prayer of the complaint. What view plaintiff in error took of the matter, we do not know. One of two things must have prevailed—either Thomas Jones had the right to convey his part of the claim without his wife joining in the deed, or the power of attorney executed by his wife was sufficient to enable him to convey her interest in his part of the claim, if any she had.

We maintain that under the decisions of the supreme court of Washington, and under the common law as well, both Thomas Jones and Betsy Jones, his wife, could convey their respective portions of said claim as though they were sole, and that Mrs. Jones, having that right, could authorize her husband to act for her.

In equity two rules obtain relative to the common-law powers of married women. Text-writers refer to these doctrines, for purposes of distinction, as English and American

The English doctrine is that when by deed or grant a married woman is clothed with the title to real estate as her separate property, there goes with the grant an unlimited power of control and disposition; the other doctrine is that such married woman's powers of disposition are limited to the express terms of the grant; if it gives her none, she is powerless.

Kelly's Contracts of Married Women, 231–251.

Under the English doctrine, says Mr. Kelly, "when a married woman has property to her sole and separate use *she can contract concerning that separate property*, but could not contract so as to bind her person or bind property not held to her separate use." The separate estate was created by Congress for the purpose of excluding the common-law marital rights of the husband and to secure the wife an independent estate and income free from the control and interference of the husband.

See Kelly, *idem*, 232.

Speaking of grants and conveyances to married women, the same author, page 232, proceeds:

"Equity recognized this new equitable ownership in married women and gave her, as incident to that ownership, an independent personal status, and in the beginning established the doctrine that with respect to this separate estate

she is free from the common-law disability of coverture and invested with the rights and powers of a person who is *sui juris*. To every separate estate held by a person who is *sui juris* the common law attached the right of alienation. * * * The wife has in equity the same *jus disponendi* over her separate estate as she would have if free from the disability of coverture."

The American doctrine, says this author, page 259, has been adopted in Pennsylvania, South Carolina, North Carolina, Tennessee, Mississippi, and Rhode Island, whilst all the other States adopt, in the main, the English doctrine.

Chancellor Kent held against the English doctrine in Church *vs.* Jacques, 3 Johns. Ch., 78, but was reversed in the Court of Errors. (17 Johns., 548.)

Vonderhein *vs.* Mallory, 22 Wend., 526.
Gunter *vs.* Williams, 40 Ala., 565.

For other States, see cases cited in Kelly, pages 258, 259.

The State of Washington is committed to this English doctrine. In Gardner *vs.* Port Blakely Mill Co., 8 Wash. St., 1, it is held that land entered by the husband or wife when by the terms of the act both or either spouse were permitted to make an entry became and was the separate property of such spouse, and that either could convey the fee as if sole.

We accordingly contend that it was entirely within the province of the supreme court of Washington to adopt, if it chose, the English doctrine as to the powers of a married woman over her separate property and her right to dispose of the same as if sole, and in doing so it was not necessary that the curative act in question be considered or passed on by that court.

II.

Plaintiff in error contends that issue is not taken by the pleadings upon the question of adverse possession. A very superficial examination of the record will suffice to show that this contention is without foundation. In the fourth paragraph of the complaint the allegation is specific—

"That plaintiff is the equitable owner of all of said donation land claim of Thomas Jones and his wife, Betsy Jones, excepting, &c., and is now in possession thereof; that the plaintiff and its grantors have been in the actual, open, and notorious possession of said property continuously since the 28th day of March, 1862, under color and claim of title."

No motion was interposed to this part of the complaint, but plaintiff in error answered (Record, p. 165) as follows:

"And denies that plaintiff and its grantors or any of them have been in the open and notorious possession of said property continuously since the 26th day of March, 1862; and denies that they have at any time since said date been in the actual possession of said land or any part thereof; and denies that at any time since said date they have been in the open possession of said land or any part thereof; and denies that they have been at any time since said date in the notorious possession of said land or any part thereof; and denies that they have ever at any time been in possession of said land or any part thereof in any sense whatever, either under claim of title or otherwise."

The issue therefore is directly and conclusively raised. Under numerous decisions of the supreme court of Washington this action could have been maintained on this issue alone.

Isaacs *vs.* Holland, 4 Wash. St., 54.
2 Hill's Code, sec. 206, and cases.

In its opinion in this case (Record, p. 182) the court say:

"We think, especially under the provisions of our code, which require only a plain and concise statement of facts constituting a cause of action, that the complaint is sufficient, and even if it were not, this court has repeatedly held that in equity causes when the whole cause was before it that in the interests of justice it would consider all amendments made to the pleadings that could have been made in the court below; nor can it work any hardship or surprise in this case, as suggested by appellant in his reply brief, for the case was tried upon the theory of adverse possession and the appellant has been industrious in preparing his defense to that proposition to the extent of having surveys made to show that the cabin, which plaintiff testified to have taken possession of, was not on the land in controversy."

Respectfully submitted,

W. Lair Hill,

J. A. Keddy,

Attorneys for Defendant in Error.

Supreme Court U. S.
FILED.
APR 14 1896
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

TERM No. 230.

CARMI DIBBLE, PLAINTIFF IN ERROR,

vs.

THE BELLINGHAM BAY LAND COMPANY, DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

REPLY BRIEF OF PLAINTIFF IN ERROR.

ALFRED L. BLACK,
E. B. LEAMING,
Attorneys for Plaintiff in Error.

Filed this ..... *day of April, A. D. 1896.*

..... *Clerk.*

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W. Lair Hill,

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Filed this ..... *day of April, A. D. 1896.*

..... *Clerk.*

REPLY BRIEF.

The statement of point No. 1, as made in the brief of defendant in error, is in itself a complete answer to the objection to this court's jurisdiction attempted to be raised.

It is conceded that the Territorial statute became a section in the State statutes by operation of Sec. 2, Art. 27 of the State Constitution. No authority is needed to sustain the proposition that that section of the Constitution is self-executing. The Territorial statute was therefor continued as a State statute. The Territory ceased to exist and the State came into being. If the statute continued it was as a State statute.

The Legislature of the State of Washington, Laws of 1889–90, page 236, specifically authorized the codifying of this and other Territorial acts that became State laws by force of the Constitution; and again, Laws 1891, page 173, ordered the distribution of the laws so codified as the laws of the State. The Legislature has frequently recognized Hill's Code as the law of the State by amending sections thereof. Counsel's contention, to have any force, must claim that there is no statute law in the State of Washington. The cases cited apply solely to Territorial acts that never became State laws.

This Court has frequently passed on similar questions (*Weston* v. *Charleston, 2 Peters 462; R. R. Co.* v. *Rock, 4 Wall 181*), and has directly passed on and reversed a decision based on a statute of the State of Washington continued in the identical manner as the one at bar. *Scott* v. *McNeal, 154 U. S. 34.*

The decree below in this case is beyond question a de-

cision sustaining a statute of and authority claimed under the State of Washington.

In reply to point No. 2 of defendant in error, we urge:

A. As affecting the jurisdiction of this court, the contention is without force, for the reason that the Supreme Court of the State of Washington did not attempt to pass on the strength of the title of plaintiff in error or on his cross-bill. In express terms the Court sustained the title of defendant in error, conceding plaintiff's claim of title, and yet deciding against him. See opinion of Court, printed Record, page 181. "The proof of two facts was attempted by respondent (defendant in error), the establishmant of either of which would be fatal to appellant's (plaintiff in error) claim.

This Court, in certain cases, will even go so far as to assume jurisdiction in a case where it does not appear that the court below passed on the federal question by presuming that it must have passed on it. *Klinger* v. *State of Missouri, 13 Wall 263.*

B. Defendant in error is, and at all times since issue framed has been, estopped by the pleadings from denying the title of plaintiff in error through the heirs of Betsey Jones.

This action is brought by defendant in error to establish the power of attorney hereinbefore referred to, and to declare that the fact that certain persons, heirs of Betsey Jones, have by warrantee deed conveyed the premises in question to plaintiff in error, is a cloud on its title, including a prayer that these clouds be removed, and that its title be quieted.

The amended complaint (paragraphs 7 and 8), printed Record, pages 159–160, sets up and alleges as a fact the death of Betsey Jones intestate, that deeds were made to plaintiff in error by certain persons, naming them, and that the persons so named were the heirs-at-law of Betsey Jones. These solemn averments are undenied, and are verified by defendant in error. They are admitted by the answer of

plaintiff in error, printed Record, 165–167, and thereby are established by the pleadings, and cannot be controverted or gainsayed. Even if there were a finding of fact contrary to such admissions, it would be set aside.

Pomeroy's Remedies and Remedial Rights, 1876 Ed., Sec. 617.

An action to remove a cloud from a title is an equitable remedy used only in a peculiar class of cases, and in such cases practically tries the title to lands. It requires several requisites. Among them is the establishment in the party seeking relief of a title or interest in the premises in question. Another requisite is an existing cloud, which must be a claim good on its face but with latent defects. *Vol. 3, Pomeroy on Equity Jurisprudence, 1883 Ed., Sec. 1399; Bissell* v. *Kellogg, 60 Barb. 629.*

Each of these requisites must be alleged and proven, and the absence of either is fatal. The facts creating the cloud and the facts showing its invalidity must both be alleged and proved. *Teal* v. *Collins, 9 Ore. 89; Hibernia S. & L. Co.* v. *Ordway, 38 Cal. 681; Wals* v. *Grosvenor, 31 Wis. 684; Collart* v. *Fisk, 38 Wis. 243.*

In the case at bar, the defendant in error set up a title from Betsey Jones, and allege as the cloud the fact that the heirs of Betsey Jones have executed a deed to plaintiff in error. This, together with the fact that the power of attorney is not of record, constitutes a cloud. Two courses were open to defendant in error. They could have alleged the invalidity of the cloud by either denying that the heirs of Betsey Jones received any title from her, *i. e.*, that defendant in error acquired all of Betsey Jones' title in her lifetime, or else they could deny that the persons purporting to be the heirs were in fact heirs.

They elected the former course, and by the amended complaint admitted that the alleged heirs were the heirs.

The issue raised and the challenge given by defendant in error is that it has title absolute; that plaintiff in error has title presumptive, and as against defendant in error title absolute if the title set up by it fails. No other or further issue is tendered. That plaintiff in error has title pre-

sumptive is admitted by defendant in error in the event of its being unable to prove title absolute in itself, and is demonstrated by the allegation that plaintiff in error's title is a cloud. Were it not good on its face, it would be no cloud. The conclusion is inevitable.

C. Plaintiff in error is in possession under his deeds, and was in the actual possession prior to the filing of his answer. Printed Record, page 106.

As against a person without title he is entitled to relief and to have his possession confirmed. Except by virtue of the code section, defendant in error has absolutely failed to establish any right or title to the premises. As against defendant in error, therefore, plaintiff in error, by reason of his actual possession, is entitled to a decree guaranteeing his possession and is presumptively seized of the fee. *Vol. 1, Greenleaf on Evidence, Redfield's Ed., Sec. 109.* This possession is an absolute inherent property, an interest in land sufficient to maintain ejectment. If deprived of it the decree sustaining the code section is taking this, a property right. Marshall vs Knox 16 Wall 8-87

D. The deeds to plaintiff in error from the heirs of Betsey Jones convey with words of grant, and contain covenants by the grantors that they are the heirs. Printed Record, pages 145–149.

The covenants and granting words carry a presumption of their truth, and pass to plaintiff in error a presumptive title to whatever interest Betsey Jones had in the land in controversy.

A covenant that a person is an heir, while not conclusive proof of heirship, is sufficient evidence of the fact to shift the burden of proof. As evidence of pedigree it is competent. It is a declaration against interest; the covenant, if false, would subject the person making it to an action.

Wharton on Evidence, 3d Ed., Vol. 2, Sec. 1251.
19 Amer. & Eng. Enc. of Law, page 63.
Phillips on Evidence, 257.
Paxton v. *Price, 1 Yeates, 500.*
Bowser v. *Cravener, 56 Penn. St. 142.*

E. Plaintiff in error introduced evidence sufficient to establish the fact of heirship in his grantors from Betsey Jones. No evidence is in the case to the contrary. If any of the evidence on this proposition is competent a presumption is raised, and being uncontradicted establishes in plaintiff in error a property right to the extent of a fee title to the premises in controversy.

The fact that Betsey Jones is dead is admitted. Printed Record, page 1.

That she died intestate, and that the grantors in *Exhibits Nos. 1 and 2*, printed Record, pages 145–149, were her heirs, is proven by the testimony of Black, printed Record, pages 90–100.

We ask the Court to examine particularly that part of the testimony of this witness not cited in defendant in errors' brief relating to the parish records, as well as the portion printed in the brief. The witness, Black, possibly should have, without reserve, at the start, answered as to his compensation. He felt that he had the right to refuse, although he finally answered fully. Printed Record, pages 97–98. That he was sincere in the matter is shown by the offer of plaintiff fully set out on page 106 of printed Record.

The presumption is that when a person dies, he or she dies intestate. Until a will is produced the presumption of intestacy is established by proof of the death.

Aside from this presumption, the testimony of Black that he is an attorney-at-law, and that he has examined the records of Whatcom county and found no will, but, on the contrary, proceedings in administration, affords affirmative proof of intestacy. The fact that the general repute is that Betsey Jones died intestate is competent evidence, as is hereinafter discussed.

Presumptive proof of intestacy is all that is required in this case, as there is no evidence to the contrary.

The testimony is positive that Betsey Jones died childless, and left the grantors in *Exhibits Nos. 1 and 2* aforesaid as her sole heirs at law.

The general objections interposed to the answers of witness are futile. The rule is well settled that to give force to an objection the specific grounds must be urged. An attorney objecting must have some specific object and purpose. He will not be permitted to put out a drag-net and not give the trial court or the opposing counsel an opportunity to judge of the force of his position and remedy it if correct. If an answer could be competent for any conceivable purpose, such an objection will be ruled out. There can, however, be no question but that the answers of this witness were competent.

Vol. 1, Thompson on Trials, Sec. 693, and cases in notes.

Rush v. *French, 1 Arizona 99.*

The motion to strike the testimony of this witness as a whole, on the ground that it is secondary and hearsay, to prevail must exclude all competent sources of knowledge. If any competent source of knowledge is shown, the testimony will stand.

At least three competent sources of knowledge as to the fact of heirship are shown—

1. General reputation among the family and community.
2. Written declarations by Betsey Jones, now deceased.
3. Examination of records in the archives of the churches.

1. Heirship is a difficult fact to prove, and but few persons can actually swear to the physical fact of a birth or a death, as but few are present at the event. For this reason an exception to the general rule is made, and certain classes of evidence not usually admissible are allowed. The manner a person is recognized and acknowledged by members of the family and by the community at large are held to be evidence of relationship. A man recognizing a child to be his son raises a presumption that in fact he is a son. For such reasons and on the ground of policy the law recognizes as competent evidence of marriage, death and pedigree the general reputation in the family and in the community.

Vol. 1 Wharton on Evidence, 2d Ed., secs. 205, 223 and 224; Abbott's Trial Evidence, page 94; Eaton v. *Tallmadge, 24 Wis. 217; Russell* v. *Jackson, 22 Wend. 276; Jackson* v. *Boneham, 15 Johns. 226; Jackson* v. *Cooley, 8 Johns. 128; Viall* v. *Smith, 6 R. I. 419; Spears* v. *Burton, 31 Miss. 547.*

2. A written declaration, such as a letter, paper or entry in a book, is admissible to prove heirship as primary evidence, provided it is made by a member of the family, and provided further that declarant is dead. The letter from Betsey Jones falls within the rule and is competent.

Vol. 1, Wharton on Evidence, 2d Ed., Sec. 210, and cases cited in notes.

Vol. 1, Greenleaf on Evidence, Redfield's Ed., Sec. 104.

3. The records of the parish churches and entries in family bible are competent primary evidence of marriages, births and deaths. *Vol. 1, Wharton on Evidence, 2d Ed., Sec. 219 and cases cited in notes; Jackson* v. *King, 5 Cowen 237.*

Knowledge acquired from these sources is knowledge of competent facts. Testimony based on such information is original in its character. It is testimony of facts, and of competent facts. General reputation is a fact. How can we conceive of evidence to prove such a fact other than the testimony of one who knows such reputation. The fact that declarations are admitted as primary evidence makes the declaration a fact. The records of the churches and entries in the bible are primary and are facts. The witness Black does not attempt to testify as to the contents. He testifies to the fact of heirship, and, on disclosing the source of his knowledge, shows that it is based on primary and competent evidence. He did not see a marriage, a birth or a death, but he did see and hear evidence as primary and that which is as competent to prove the fact as any that could be introduced.

It is not the physical bringing into the world of a child that is produced in court to prove the birth, it is the testi-

mony of a witness who knew that the birth took place. He may have been convinced of that fact by having seen it or by any other competent primary proof.

This testimony raises a presumption, and while it might not be conclusive proof, is, in the event of no evidence to the contrary, sufficient to prove heirship. Especially is this true in a case like the one at bar, where the case does not present a conflict of heirs between themselves.

The exhibits, consisting of records of marriages, births and deaths, offered in evidence and identified by the witness Black as being copies certified by the proper custodian of such records in the manner required by law and as having been compared by witness with the original records, either entitle witnesses' testimony to stand or else were themselves entitled to be admitted as primary evidence.

Jackson v. *King, 5 Cowen 237, S. C., 8 N. Y. Com. Law 638 and note.*

Jackson v. *Boneham, 15 John. 226.*

To the fact that Betsey Jones came from the place where her heirs now reside and thereby furnishing proof of identity, the testimony of Black is corroborated by the testimony of defendant in error's witness Smith, printed Record, pages 53–55.

The citations of counsel for defendant in error to Greenleaf, Wharton and two cases, do not show that the testimony should be stricken.

The class of testimony of witness Black is not held bad by any of the citations, unless it be the Oregon case. Admit that by the Oregon case it is bad. This case should not outweigh the numerous authorities heretofore cited, and logic and reason as well.

The Oregon case does not hold as counsel contends. True, it holds that in that case heirship was not proven. The witness did not however attempt to show who were the heirs; his most positive answer was qualified with "as far as I know." He admitted that he did not know. His testimony did not identify the deceased as the person whose heirs were

named. This case even supports the testimony of witness Black and the methods sought to be used in the trial of this case. The witness Black was produced, testified to the facts, stated his source of knowledge, offered the source of knowledge, and desired to have them admitted in evidence. Such a course was directly in accordance with the line indicated by the Oregon case to be the proper one.

In reply to point No. 3, we call the attention of the Court to the fact that Mr. Justice Andrews was Chief Justice at the time of the hearing and entry of judgment, and also at the time of the making of the certificates of questions raised. Printed Record, pages 186–187.

We do not contend that the Chief Justice can by a certificate infuse in a case a federal question not in the record. We, however, urge that it is well settled that this Court will take such certificate to aid and make more certain a question fairly raised by the record. In the case at bar the certificate attempts to do no more, and in no sense is in conflict with the opinion. *Powell* v. *Brunswick, 150 U. S. 433.*

Defendant in error, on page 16 of its brief, admits that the federal question was raised, and attempts to avoid it.

Our original brief fully covers this discussion. Suffice it to add that by Sec. 108, Vol. II, Hill's Code, the common law is still in force in the State of Washington.

In the discussion of point No. 4, counsel seem to assume that great injustice would be done by failing to sustain the constitutionality of the code section. That it would be simply carrying out an honest transaction and the intent of the parties. That a failure to sustain the act would be perpetuating a vested right to do wrong.

Consider the facts, admitting the existence of the power of attorney, which we deny as a fact, and we find Thomas and Betsey Jones the owners of 320 acres—each the owner of 160 acres. A sale is made by Thomas Jones to Edward Eldridge for $300. Printed Record, pages 29–30. In fact, Eldridge has now received the share belonging to Thomas Jones, 160 acres (see disclaimer, printed Record, page 162), many times the equivalent of the money paid by him. He has received all that he expected to receive, all that he was entitled to receive, and all that he paid for. He and all parties to the transaction knew that Betsey Jones had no power to make her husband her attorney in fact. They were charged with full knowledge of the law, and the price paid shows that in fact but 160 acres was attempted to be conveyed. Betsey Jones' name was signed simply to bar her dower right to the Thomas Jones land. She never received a penny consideration.

All parties knew, and in law were charged with knowledge, that such a transaction, such a power of attorney, was an absolute nullity. How, then, can it be said that the object and effect of the code section, as applied to this case, is to execute the intention of the parties and to promote justice.

Where parties had the right and power to do an act in some certain way, attempted to do it and failed by omitting some immaterial requirement, where the transaction was honest and fair and the parties in fact acted on a power they possessed, a different case is presented, a voidable and not an absolutely void transaction is to be considered.

Tested by the rule quoted on Brief, page 24, from Sutherland, the code section cannot be sustained as applied to this case.

The Legislature, by previous statute, cannot confer jurisdiction. A person cannot be declared in court without process. Power to act in an individual is identical with jurisdiction in a court. Would it be contended that the Legislature in advance could say that the property of Betsey Jones, by the operation of an act of legislation, should

become the property of Eldredge without a deed, power of attorney or some act on her part? If the Legislature could not pass such a law, how can it be urged that the property passes by an act that retrospectively attempts the same thing? The power of attorney is a nullity—as if it were not. If the property passes, it is the legislative fiat that effects the transfer; there was no power of attorney, as no person existed who had the ability to make one.

I have been unable to find a single authority holding that a defective transaction could be healed or cured by legislation if it were an unauthorized act, or if there was a want of power or jurisdiction in the parties attempting to act, *i. e.*, a transaction absolutely void in its inception cannot afterward have life infused in it by legislation.

In *Watson* v. *Mercer*, and, in fact, in all the cases in which defective acknowledgements have been cured by retrospective legislation, the grantors in the deeds had the power to execute them. The defective execution simply made a voidable as distinguished from a void transaction.

The distinction is clearly stated in *Johnson* v. *Richardson*, *44 Ark. 365–374*, where the Court says, "We do not mean to say that the Legislature could retrospectively confer upon a married woman an authority which she did not previously possess."

In *Shonk* v. *Brown*, *61 Penn. St. 320*, the discussion by the Court is conclusive on the point. Confusing cases can be found rendered so by the fact that some courts hold an instrument absolutely void that others hold simply voidable. In no case, however, does the Court hold that life can be infused in that which is absolutely dead from want of power in the original parties to act.

Alabama Life Ins. Co. v. *Boykin*, *38 Ala. 510.*
McGhee v. *McKenzie*, *43 Ark. 156.*
Pryor v. *Downie*, *50 Cal. 388.*
Russell v. *Rumsey*, *35 Ill. 362.*
Tilton v. *Swift*, *40 Iowa 78.*
Maguiar v. *Henry*, *84 Ky. 1.*
Grove v. *Todd*, *41 Md. 633.*
Meighen v. *Strong*, *6 Minn. 177.*

Routsong v. *Wolf, 35 Md 174.*
N. Y. & Oswego R. R. Co. v. *Van Horn, 57 N. Y. 473.*
Maxwell v. *Goetschius, 40 N. J. L. 383.*
Houston v. *Bogle, 10 Ired. (N. C.) 496.*
Chestnut v. *Shane, 16 Ohio 599.*
Shonk v. *Brown, 61 Penn. St. 320.*
Kimball v. *Rosendale, 42 Wis. 407.*
Noble v. *Union River Logging Co., 147 U. S. 165.*
1 Kent Com. 455.

The argument in support of the eighth assignment of error, on page 57 of our former brief, is a complete and conclusive answer to the propositions raised by points 5, 6 and 7 of defendant's brief.

The bearing of adverse possession on this case is discussed at length in our former brief, and we respectfully urge that the contention there made to the effect that this is a case in which the sole object is the establishing and declaring valid a power of attorney, in order that a cloud may be removed from the title of defendant in error, is the entire scope of the case, and that no decision in fact was made or could have been reached without considering the question of the power of attorney.

It is true that this Court follows, as far as practical, the rule as laid down by a State Supreme Court in matters of local law. In the case at bar the State Court distinctly held that a color of title was necessary, and designated that color. This appears in both the opinion and certificate of questions raised. No one will dispute that an actual adverse possession can be maintained, based on a claim of right, without any color of title, but when it is contended that an adverse title has ripened by constructive possession according to the metes and bounds of a color of title, it is equally clear, both by principle and authority, that in fact a color of title must exist.

It was this latter class of adverse title that, by the Supreme Court of the State of Washington, was held to

exist in this case. That court did not try the case on the findings of the court below. It, under the practice in that State, was a trial *de novo*, and on that species of a trial the Supreme Court affirmed the decree of the lower court, not its findings, and as facts found, as stated in its opinion that, as a fact, the character of possession that existed required a color of title to support it, and designated that color as a warrantee deed from the owner.

An examination of the record demonstrates that no actual possession of the Betsey Jones land was ever had, and that a finding of actual possession would be wholly unsupported by the evidence.

The Supreme Court of the State of Washington has in no way contravened the doctrines here stated subsequent to the decision in this case. In *Ward* v. *Higgins*, *7 Wash. 624*, the citation is *dicta*, and in that case it is expressly held that the color of title was not void but voidable. The citation even demonstrates as a whole that, by the first use of the word void, an instrument that could be avoided was described, and not a nullity.

Even had the Supreme Court of Washington, subsequent to the decision of the case at bar, held doctrines on adverse possession, as contended by counsel, it would be of no avail to him in this case.

Here the question of adverse possession is a question affecting the jurisdiction of this court, and it is the view taken by the Supreme Court of Washington in this case that determines whether a federal question exists.

The fact that subsequently that court made a different ruling in no wise affects their ruling in this case or the jurisdiction of this court. The question was raised but reserved in *Gross* v. *U. S. Mortgage Co.*, *108 U. S. 795*.

Had the Supreme Court of Washington decided this case on the doctrines of adverse possession without in any way infringing federal law, this Court undoubtedly at once would dismiss this writ of error. The fact that they had in other subsequent cases overruled their expressed opinion on adverse possession, so that were the case to be now pre-

sented it could not be decided on that doctrine, would be no answer in this court to a motion to dismiss.

We respectfully submit that the decree below in this case should be reversed and the complaint of defendant in error dismissed.

Alfred L. Black

Att'ys and of Counsel with Plaintiff in Error.